

## In Defense of Outlaws: Liberalism and the Role of Reasonableness, Public Reason, and Tolerance in Multicultural Constitutionalism

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# IN DEFENSE OF OUTLAWS: LIBERALISM AND THE ROLE OF REASONABLENESS, PUBLIC REASON, AND TOLERANCE IN MULTICULTURAL CONSTITUTIONALISM\*

*Robert Justin Lipkin\*\**

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## INTRODUCTION

What is liberalism's role in resolving the problems of multiculturalism? Two kinds of multicultural problems are of special interest: the problem of international multiculturalism and the problem of domestic multiculturalism.<sup>1</sup> The problem of international multiculturalism concerns the relations among different national groups or peoples.<sup>2</sup> What is the West's proper stance concerning the recent global quest for freedom and democracy? Should every legitimate government recognize freedom of expression and conscience? What justifies the West's condemnation of those outlaw regimes that deny human rights and other types of Western constitutional protections? This problem of multiculturalism forces us to justify our conception of international political argument. Does this conception successfully reach alien shores or is it merely a reflection of ourselves?

The problem of domestic multiculturalism is concerned with how minority cultures should be treated in a liberal democracy. This is a particular application of *the* central question of liberalism, namely, can we construct a legal and political framework within which people having different conceptions of good can interact peacefully?<sup>3</sup> This problem of multiculturalism questions whether we can construct such a

1. The problem of international multiculturalism includes questions of the relations among different nations as well as relations among different national groups or peoples within a nation.

2. There appears to be no one definition of the term "peoples" in international legal theory. Intuitively, the term refers to a distinct collectivity having a common history, language, culture and religion. This intuitive definition, however, harbors many difficulties. See David Mackinson, *A Logician's Point of View*, in *THE RIGHTS OF PEOPLES* 69, 72-76 (James Crawford ed. 1988) (discussing "peoples" in the context of Declarations and Conventions of the United Nations); James Crawford, *Some Conclusions*, in *supra*, at 159, 170 (arguing that "there is no single international law definition" of peoples).

3. A person's concept of the good is her idea of virtue and human flourishing; it includes answers to the following questions: How should one live? What pursuits are virtuous? What is it to be a good person?

framework for people having different cultures. A small sample of the questions that fall within the domain of domestic multiculturalism include:<sup>4</sup> Can liberal constitutionalism embrace cultural rights and, if so, how should such rights be respected?<sup>5</sup> Do Native Americans, for example, deserve special rights within American society? Should there be a cultural defense in our system of criminal justice?<sup>6</sup>

Tolerance connects these different issues by asking us to respect cultural diversity. Is liberalism committed to a strong conception of tolerance or can it tolerate only benignly nonliberal cultures? This Article concludes that liberalism cannot tolerate outlaws, a term this Article uses to refer to those regimes and cultures that reject a liberal conception of justice and politics. Outlaw cultures typically reject in-

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4. The problems of domestic multiculturalism implicate questions of law generally, and questions of constitutional law in particular. Thus, other questions associated with domestic multiculturalism include: Should we restructure our constitutions to warrant cultural rights and other constitutional protections based on culture? Should we regard a liberal constitutional democracy as "culture-blind" in the same way as prevailing opinion concerning racial justice regards it as "color-blind?"

5. The idea of a *cultural right* might prove implausible. Conceptually, a cultural right might be just the right of *individuals* to preserve their culture. A stronger conception of cultural right might mean that cultures ontologically and morally have nonreducible prerogatives to preservation independently of individual members. For a discussion of these and other issues concerning cultural diversity and cultural rights, see generally LOREN E. LOMASKY, *PERSONS, RIGHTS, AND THE MORALITY COMMUNITY* (1987); MICHAEL IGNATIEFF, *THE NEEDS OF STRANGERS* (1985); ANTHONY D. SMITH, *THE ETHNIC REVIVAL* (1980); HAROLD R. ISAACS, *IDOLS OF THE TRIBE: GROUP IDENTITY AND POLITICAL CHANGE* (1975); VERNON VAN DYKE, *HUMAN RIGHTS, ETHNICITY, AND DISCRIMINATION* (1985); WILL KYMLICKA, *LIBERALISM, COMMUNITY, AND CULTURE* (1989); WILL KYMLICKA, *MULTICULTURAL CITIZENSHIP* (1995); Frances Svensson, *Liberal Democracy and Group Rights: The Legacy of Individualism and Its Impact on American Indian Tribes*, 27 *POL. STUD.* 421 (1979); RICHARD MULGAN, *MAORI, PAKEHA AND DEMOCRACY* (1989); KENNETH MADDOCK, *THE AUSTRALIAN ABORIGINES: A PORTRAIT OF THEIR SOCIETY* (1972);

6. The cultural defense contends that a person's cultural background can be used as a defense in criminal proceedings. See generally, Note, *The Cultural Defense in the Criminal Law*, 99 *HARV. L. REV.* 1293 (1986) (arguing for recognition of a formal cultural defense based on United States purported values of "individualized justice and cultural pluralism"); Nilda Rimonte, *A Question of Culture: Cultural Approval of Violence Against Women in the Pacific-Asian Community and the Cultural Defense*, 43 *STAN. L. REV.* 1311 (1991) (arguing for a rejection of the cultural defense, especially since the defense largely excuses the abuse of women).

Educational issues contained in the problem of domestic multiculturalism include: In a multicultural, multi-lingual society is it permissible for education and government to be carried on in English only? What role should cultural pluralism have in elementary education? In higher education? For a discussion of the role of cultural pluralism in higher education see Robert Justin Lipkin, *Pragmatism, Cultural Criticism and the Idea of a Postmodern University*, in *AN ETHICAL EDUCATION: COMMUNITY AND MORALITY IN THE MULTICULTURAL UNIVERSITY* 49 (M.N.S. Sellers ed., 1994).

dividualism, autonomy, and equality. Thus, outlaws are usually defiant or skeptical of toleration as a moral or political virtue.<sup>7</sup>

This Article focuses on the role of tolerance in the liberal constitutional ideal, and how tolerance is expressed through reasonableness and public reason. This Article argues that no non-question begging argument exists against the outlaw's rejection of the liberal conception of politics.<sup>8</sup> Particularly, no non-circular argument exists against the outlaw's rejection of human rights, freedom of speech and conscience, and other liberal values. Given an antifoundationalist conception of reasoning this conclusion should not be surprising.<sup>9</sup> Clearly, epistemology and metaphysics, which form the basis of liberalism in its traditional sense, are anathema to a robust conception of tolerance. At best, liberalism can tolerate only regimes and cultures that are sufficiently congenial to liberalism so as to not pose a moral or political threat to liberal values.

This Article argues that it is morally desirable to recognize this fact, because liberalism should clearly renounce epistemology and metaphysics and instead cast its lot with a pragmatic conception of pluralism and diversity in human society. The difference between pragmatism and liberalism is that liberalism insists that no non-question begging arguments exist that justify liberal values internationally or domestically, whereas pragmatic political argument claims to be able to achieve a modest consensus over many issues, while leaving a

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7. Whether this should surprise us is open to question. Critics of liberalism, both progressives and communitarians, have always been suspicious of liberal ideology. Does our public self-conception in the United States include the conviction that tolerating diversity is a commitment of our liberal heritage? If so, the arguments against liberalism's capacity for tolerance should force us to reconceive our secular liberal faith.

8. I wish to make one admonition concerning the phrase "begs the question" and its cognates. The locution "begs the question" refers to the informal, logical mistake of circular reasoning. Thus, begging the question is a charge of illogicality. Recently, "to beg the question" has incorrectly taken on a different meaning in the media. In this sense, to beg the question is to utter something that forcefully prompts asking a certain question, for example, my assertion that O.J. Simpson was present when Nicole Simpson and Ronald Goldman were killed "begs the question," or "begs asking the question," what did O.J. do? or did he kill them? Throughout this article I use "begging the question" and its cognates in the first (logical) sense only.

9. Antifoundationalism rejects the view that every controversy or question necessarily has a rational solution. For a discussion on the issue of antifoundationalism see Robert Justin Lipkin, *Beyond Skepticism, Foundationalism and the New Fuzziness: The Role of Wide Reflective Equilibrium in Legal Theory*, 75 CORNELL L. REV. 811 (1990) [hereinafter Lipkin, *Beyond Skepticism*] (discussing foundationalism and skepticism) and Robert Justin Lipkin, *Kibitzers, Fuzzies, and Apes Without Tails: Pragmatism and the Art of Conversation in Legal Theory*, 66 TUL. L. REV. 69 (1991) [hereinafter Lipkin, *Kibitzers*] (discussing one new anti-foundationalist theory-conversationalism-and concluding that it is best understood as a form of wide reflective equilibrium); see also Robert Justin Lipkin, *Can American Constitutional Law Be Postmodern?*, 42 BUFF. L. REV. 317 (1994) [hereinafter Lipkin, *American Constitutional Law*] (discussing dualism in constitutional theory).

great many others unresolved and controversial.<sup>10</sup> Systemic controversy suggests deep divisions in our moral and political conception of ourselves as persons. Such division suggests that our society is much less unified or homogeneous than one would hope, and where such fragmentation exists, the implementation of real tolerance and diversity may be problematic.<sup>11</sup>

Part One of this Article examines John Rawls's recent attempt to construct a liberal conception of "the law of peoples."<sup>12</sup> In Part Two, this Article argues that Rawls's reliance on reasonableness provides too weak a basis for international political argument; once we understand the limits of reasonableness in political argument, it becomes clear that no conception of reasonableness exists strong enough to refute the outlaw's argument without begging the question. This Article argues, in Part Three, that Bruce Ackerman's recent statement of political liberalism fares no better than Rawls' attempt and cannot be viewed as the foundation of the law of peoples. Part Four concludes by sketching a pragmatic conception of international and domestic multiculturalism.

## I. A RAWLSIAN LAW OF PEOPLES

### A. *Rationalist Liberalism and Pragmatic Liberalism*

In an age undergoing cataclysmic change, witnessing the fall of some of history's most vicious tyrannies, a renewed interest in the idea of liberal democracy has emerged as the world's best hope for uto-

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10. Fallibilism tells us to endorse those views that survive criticism. The notion of "surviving criticism," of course, needs explication. Pierce has stated:

Let any human being have enough information and exert enough thought upon any question, and the result will be that he will arrive at a certain definite conclusion, which is the same that any other mind will reach under sufficiently favorable circumstances . . . . There is, then, to every question a true answer, a final conclusion, to which the opinion of every man is constantly gravitating . . . . It remains that there is a definite opinion to which the mind of man is, on the whole and in the long run, tending. On many questions the final agreement is already reached, on all it will be reached if time enough is given.

8 CHARLES S. PEIRCE, COLLECTED PAPERS OF CHARLES SANDERS PEIRCE § 8.12 (Arthur W. Burks ed., 1958).

11. Where fragmentation exists, it is necessary to understand why the illusion of unity persists. A genealogy of the sources of power and domination might prove edifying in this regard. See generally THOMAS E. WARTENBERG, *THE FORMS OF POWER* (1990) (providing a comprehensive discussion of theories of power).

12. John Rawls, *The Law of Peoples*, in *ON HUMAN RIGHTS* 41 (Stephen Shute & Susan Hurley eds., 1993) [hereinafter Rawls, *The Law of Peoples*]. This article is also reproduced in 20 *CRITICAL INQUIRY* 36 (1994). In the present Article, all citations are from *ON HUMAN RIGHTS*.

pia.<sup>13</sup> The superiority of liberal democracies over nonliberal ones might be understood in either a rationalist or pragmatist sense. As a rationalist theory, liberalism promises to construct a rationally defensible theory explaining and justifying solutions to multicultural conflicts. As a pragmatic theory, liberalism seeks consensus and stability without giving reason a starring role in this quest. Pragmatic liberalism, through perennial dialogue and persuasion, seeks a *modus vivendi* permitting the coexistence of the widest number of opposing views. Its justificatory strategy is to help us cope with conflict and to reduce suffering in the world.

The difference between these two alternatives is subtle but of great importance. Liberalism, according to the rationalist interpretation, provides a politically neutral methodology for creating a state that takes no sides on the appropriate conception of the good.<sup>14</sup> In this view, reason forms the basis of a uniquely correct form of political argument that justifies the liberal state. When one rejects the desirability of the liberal state, according to the rationalist interpretation, one does so on the basis of a faulty argument. When you systematically deny the rights and liberties of liberal citizenship, you are an outlaw. The second view seeks accommodation, compromise and, where possible, edifying explanations of both consensus and disagreement. It attempts to weave its way through the morass of racism, xenophobia, hatred, and dogmatism by providing alternative possibilities for dealing with multicultural conflicts.<sup>15</sup>

### *B. Rawls's Rationalist Conception of The Law of Peoples*

John Rawls's conception of the law of peoples takes the first approach.<sup>16</sup> Rawls correctly points out that since a society inevitably

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13. BRUCE ACKERMAN, *THE FUTURE OF LIBERAL REVOLUTION* 1-3 (1991) [hereinafter ACKERMAN, *THE FUTURE OF LIBERAL REVOLUTION*].

14. A conception of the good, as distinguished from a conception of the right, explains and justifies what kinds of life are morally valuable. A comprehensive doctrine includes a theory of the good and a theory of the right.

15. Those adopting the first approach reject a pragmatic defense of toleration because it "seems unable to account for the moral appeal of the ideal of tolerance, and, . . . it retains its force only so long as the necessary balance of power in society is preserved." Samuel Scheffler, *The Appeal of Political Liberalism*, 105 *ETHICS* 4, 5 (1994).

16. *But see* GERALD F. GAUS, *JUSTIFICATORY LIBERALISM: AN ESSAY ON EPISTEMOLOGY AND POLITICAL THEORY* 4 (1996) (characterizing Rawls' political liberalism as relying on pragmatic justification). Rawls' "law of peoples" rest on his two previous works: JOHN RAWLS, *A THEORY OF JUSTICE* (1971) [hereinafter RAWLS, *A THEORY OF JUSTICE*] and JOHN RAWLS, *POLITICAL LIBERALISM* (1993) [hereinafter RAWLS, *POLITICAL LIBERALISM*]. In this Article, I am concerned, specifically, with the law of peoples. However, understanding the law of peoples requires appreciating such key concepts as reasonableness and toleration as stated in RAWLS, *POLITICAL LIBERALISM*, *supra*, at 48-51, 194-196.

must decide, one way or the other, how to interact with other societies, "it must formulate certain ideals and principles for guiding its policies towards [them]."<sup>17</sup>

Rawls utilizes the original position, so prominently displayed in his earlier writings, in his derivation of a reasonable law of peoples.<sup>18</sup> The original position is a thought experiment in which free and equal participants under a veil of ignorance choose principles of domestic and international justice.<sup>19</sup> The extension of a liberal conception of domestic justice to the law of liberal nations involves utilizing the original position as a representational device through which contracting parties - representatives of societies - construct a reasonable law of peoples.<sup>20</sup> The original position is designed to guarantee fairness in the choice of a reasonable law of peoples.<sup>21</sup> For Rawls, the original

17. Rawls, *The Law of Peoples*, *supra* note 12, at 44. In nonideal circumstances, it is not clear that any nation, even a super-power, has anything more than rules of thumb for deciding policies regarding other countries. Compromise, accommodation and achieving a *modus vivendi* are often the means of conducting international affairs.

18. Rawls discusses the "original position" especially in RAWLS, *A THEORY OF JUSTICE*, *supra* note 16 at 118; and RAWLS, *POLITICAL LIBERALISM*, *supra* note 16, at 22.

19. Rawls, *The Law of Peoples*, *supra* note 12, at 53.

20. *Id.* The extension occurs in two stages: It occurs first in "the ideal, or strict compliance theory," and then in the nonideal or noncompliance theory. *Id.* at 52. Nonideal theory, in turn, has two stages. First, how do well-ordered societies confront nations that reject a reasonable law of peoples? Second, how do poorer nations create just institutions for achieving compliance with a reasonable law of peoples? *Id.* at 52-53.

Rawls does not suggest how principles of distributive justice would be ordered in a global context. Presumably, the equal liberty principle and the difference principles, lexically ordered, would be the principles of justice. Rawls does not pursue the redistributive implications of these principles. See CHARLES R. BEITZ, *POLITICAL THEORY AND INTERNATIONAL RELATIONS* (1979) (applying Rawls's original position to international redistribution).

21. Rawls, *The Law of Peoples*, *supra* note 12, at 53-54. The original position is generally a device to achieve impartiality, not a context of bargaining. Consider Sandel's description of the original position:

The secret to the original position — and the key to its justificatory force — lies not in what [the parties] *do* there but rather in what they *apprehend* there. What matters is not what they choose but what they see, not what they decide but what they discover. What goes on in the original position is not a contract after all, but the coming to self-awareness of an inter-subjective being.

MICHAEL J. SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* 132 (1982). Iris Marion Young also recognizes that the original position is not a genuine bargaining situation, or even one in which rational exchanges can occur. Young notes:

The constraints on reasoning that Rawls builds into this original position in order to make it a representation of impartiality, however, rule out not only any difference among participants in the original position, but also any discussion among them. The veil of ignorance removes any differentiating characteristic among individuals, and thus ensures that all will reason from identical assumptions and the same universal point of view.

IRIS MARION YOUNG, *JUSTICE AND THE POLITICS OF DIFFERENCE* 101 (1990).

The original position also "allows us the conditions under which selfhood and the ends of self-determination can be genuinely considered." Joseph Beatty, *The Rationality of the "Original*



position shows what nations can reasonably embrace or what they cannot reasonably reject.<sup>22</sup> If certain principles are arrived at by the process of reflective equilibrium,<sup>23</sup> then these same principles should be endorsed in the original position.<sup>24</sup> In the context of the law of peoples, those principles arrived at by reflective equilibrium also should be the product of the collective practical reasoning of the representatives of different peoples in the original position.<sup>25</sup>

Generally, the original position involves three conditions: "First, the original position represents the parties (or citizens) fairly, or reasonably; second, it represents them as rational; and third, it represents them as deciding between available principles for appropriate rea-

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*Position*": A Defense, 93 ETHICS 484, 492 (1983). See ANDRZEJ RAPACZYNSKI, NATURE AND POLITICS 61-62 n.5 (1987) (contending that "[t]o say that all would agree to something means that all would *have* to agree or their vote would not count." This "hides an essentially nonliberal belief, namely, that "there is only one truth" in matters political."). The important point to remember here is that the more the original position conceptually involves only one perspective the less it is a genuine bargaining situation. But see Anthony Laden, *Games, Fairness, and Rawls' A Theory of Justice*, 20 PHIL. & PUB. AFF. 189, 209 (1991) (arguing that the original position should be understood in game-theoretic terms.). For an earlier discussion of game theory as applied to social justice see, W.G. Runciman and Amartya K. Sen, *Games, Justice and the General Will*, 74 MIND 554 (1965).

It should be noted that "Rawls' argument that choice in the original position can be viewed from the standpoint of any one person comes uncomfortably close to the utilitarian concept of the impartial spectator. And the impartial spectator, for Rawls, is the personification of the error of not taking seriously the distinction between persons." Robert Sugden, *Contractarianism and Norms*, 100 ETHICS 768, 785 (1990); see ROBERT PAUL WOOLF, UNDERSTANDING RAWLS 101 (1979) (presenting a critique of Rawls' *A Theory of Justice*).

22. Rawls, *The Law of Peoples*, *supra* note 12 at 54. For Rawls, the first subject of a theory of justice is the basic structure of society. The basic structure of society consists of "the political constitution, the legally recognized forms of property, and the organization of the economy, and the nature of the family." John Rawls, *The Basic Structure as Subject*, in VALUES AND MORALS 47 (Alvin I. Goldman and Jaegwon Kim eds., 1978). It can be argued that Rawls no longer considers the family to be part of the basic structure of society. For an argument to this effect see Susan M. Okin, *Political Liberalism, Justice, and Gender*, 105 ETHICS 23 (1994).

23. Reflective equilibrium is the process by which we determine whether a political conception of justice accords "with our considered convictions, at all levels of generality, on due reflection . . . ." RAWLS, POLITICAL LIBERALISM, *supra* note 16, at 8.

24. RAWLS, A THEORY OF JUSTICE, *supra* note 16, at 120 (stating that "the conception of the original position . . . tries to account for our moral judgment and helps to explain our having a sense of justice. Justice as fairness is a theory of our moral sentiments as manifested by our considered judgments in reflective equilibrium."). Consider Philip Pettit's characterization:

The representation thesis says . . . that if you endorse principles of justice as compelling—on grounds of reflective equilibrium—then you must think that they can be represented as the product of *practical* reasoning, among suitable citizens, about which principles to establish in their own community. You must think that the principles are representable as a uniquely attractive point of convergence for appropriate constitution makers.

Philip Pettit, *John Rawls: Political Liberalism*, 91 J. PHIL. 215, 218 (1994) (emphasis in original).

25. See Rawls, *The Law of Peoples*, *supra* note 12, at 53-54 (discussing the extension of liberal ideas to the law of peoples).

sons.”<sup>26</sup> In the international context, the original position has the following description:

The parties as representatives of democratic peoples are symmetrically situated, and so the peoples they represent are symmetrically situated. . . . Moreover, the parties deliberate among available principles for the law of peoples by reference to the fundamental interests of democratic societies in accordance with, or as presupposed by, the liberal principles of domestic justice. And finally, the parties are subject to a veil of ignorance: They do not know, for example, the size of the territory, or the population, or the relative strength of the people whose fundamental interests they represent.<sup>27</sup>

These representatives know that democracy is possible without knowing the details of their natural resources or economic development.<sup>28</sup> This process expresses fairness “in specifying the basic terms of cooperation among peoples who, as peoples, regard themselves as free and equal.”<sup>29</sup> Through this process, Rawls argues, a liberal law of peoples should emerge.<sup>30</sup>

A liberal law of peoples can be extended to certain “well-ordered hierarchical societies” that meet the following three requirements: First, a well-ordered hierarchical society must respect the independence of other societies.<sup>31</sup> Second, it must impose moral duties and obligations on everyone within its borders.<sup>32</sup> Third, it must respect “basic human rights.”<sup>33</sup> Well-ordered hierarchical societies must “constitute a reasonable consultation hierarchy” so that members of its society, though “not regarded as free and equal citizens as they are in liberal societies, [must be] seen as responsible members of society who can recognize their moral duties and obligations and play their

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26. *Id.* at 53.

27. *Id.* at 54.

28. The point here is to preclude the more powerful from exploiting their more fortunate role. See RAWLS, *A THEORY OF JUSTICE*, *supra* note 16, at 379 (stating that “representatives of states would recognize that their national interest, as seen from the original position, is best served by acknowledging . . . limits on the means of war”).

29. Rawls, *The Law of Peoples*, *supra* note 12, at 54. Among the principles such nations will accept are principles of freedom, independence, equality, self-defense, nonintervention, treaty obligations and basic human rights. *Id.* at 55. For Rawls, “the basic principle of the law of nations . . . [continues to be] a principle of equality.” RAWLS, *A THEORY OF JUSTICE*, *supra* note 16, at 378.

30. See Rawls, *The Law of Peoples*, *supra* note 12, at 54-55 (arguing that working out the law of peoples for liberal democratic societies only will result in the adoption of certain principles of justice).

31. *Id.* at 60-61.

32. *Id.* at 61. It requires further that its system of law must be guided by a concept of the common good; and those who impose law and order must sincerely believe that the law is guided by a common good conception of justice. *Id.*

33. *Id.* at 62-63.

part in social life.”<sup>34</sup> In such a society, “individuals do not have the right to free speech as in a liberal society; but as members of associations and corporate bodies they have the right at some point in the process of consultation to express political dissent and the government has an obligation . . . to give a conscientious reply.”<sup>35</sup> In addition, the religious or philosophical doctrines that may control a well-ordered hierarchical society are not unreasonable in that they embrace “a measure of liberty of conscience and freedom of thought, even if these freedoms are not in general equal to all members of society as they are in liberal regimes.”<sup>36</sup>

Domestically, the principles chosen in the original position would be justice as fairness, including the principle of equal liberty and the difference principle.<sup>37</sup> In the international context, according to Rawls, the parties would choose “liberal nationalism” as the principles of justice regulating the affairs of different nations.<sup>38</sup> Rawls’ “liberal nationalism” emphasizes equal rights among nations and applies to well-ordered societies. In fact, Rawls’ conception of a reasonable law of peoples derives from the constructivist idea of justice as fairness.<sup>39</sup> Once a constructivist approach addresses all relevant questions of justice, including the problems of future generations, just savings, the disabled, the infirm, and the environment, it “is universal in its reach.”<sup>40</sup>

34. *Id.* at 62.

35. *Id.*

36. *Id.* at 63.

37. Rawls, A THEORY OF JUSTICE, *supra* note 16, at 60-61; RAWLS, POLITICAL LIBERALISM, *supra* note 16, at 5-6.

38. BRIAN BARRY, 1 A TREATISE ON SOCIAL JUSTICE: THEORIES OF JUSTICE 185 (1989).

39. Rawls, *The Law of Peoples*, *supra* note 12, at 45-46. Rawls characterizes constructivism as follows:

The principles of political justice are the result of a procedure of construction in which rational persons (or their representatives), subject to reasonable conditions, adopt the principles to regulate the basic structure of society. The principles that issue from a suitable procedure of construction, one that properly expresses the requisite principles and conception of practical reason, I think of as reasonable. The judgments those principles support are also reasonable. When citizens share a reasonable political conception of justice, they have a basis on which public discussion of fundamental political questions can proceed and be reasonably decided, not of course in all cases but we hope in most cases of constitutional essentials and matters of basic justice.

RAWLS, POLITICAL LIBERALISM, *supra* note 16, at xx-xxi.

40. Rawls, *The Law of Peoples*, *supra* note 12, at 46. Rawls nicely redeploys the notion of “universality” as the incremental resolution of the major problems faced by a theory of justice. Once we resolve each particular problem we get closer and closer to a universal theory of justice. This contrasts with the traditional approach which seeks to begin analysis with a universal theory of justice that entails solutions to all particular problems equally. *Id.* at 46.

However, an alternative approach to universality can be seen in the following pragmatist terms. Once all the relevant problems of justice have been addressed and all relevant objections considered, including objections from nonliberal societies, then if we conclude with one concep-

Although Rawls concedes that the political conception of justice might presently be impossible in some societies because the general conditions for justice are absent,<sup>41</sup> his conception of the law of peoples is not relativist or historicist.<sup>42</sup> If liberal nationalism "provides grounds for judging the basic institutions of different societies and their social policies, it achieves a universal dimension. Thus, the appropriate test of a conception's universality is whether it can be extended to, or developed into, a reasonable political conception of justice for an international society of nation-states."<sup>43</sup> In this way, Rawls plants the seed for a universally applicable law of peoples. The universality of a reasonable law of peoples lies in the fact that rejecting it is unreasonable. Consequently, a reasonable society will tolerate all other reasonable societies.<sup>44</sup> Nevertheless, not all societies must be liberal.<sup>45</sup> A society embracing a nonliberal conception of justice must be tolerated by other nations just so long as it accepts a reasonable law of peoples.<sup>46</sup>

According to Rawls, "not all regimes can be reasonably required to be liberal, otherwise, the law of peoples itself would not express liberalism's own principle of toleration for other reasonable ways of ordering society . . . ."<sup>47</sup> Just as a reasonable nonliberal conception of the good must be tolerated in a liberal democracy, reasonable nonliberal nations must be tolerated by a reasonable law of peoples "provided

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tion of justice, it applies across persons and across societies. Alternatively, this process might be strong enough only to rule out certain conceptions. In any case, this requires listening to the objections concerning each problem. In the case of the law of peoples it requires listening to the objections of nonliberal societies, perhaps even unrepentant nonliberal societies. See Robert Justin Lipkin, *Pragmatism-The Unfinished Revolution: Doctrinaire and Reflective Pragmatism in Rorty's Social Theory*, 67 TUL. L. REV. 1561, 1614 n.159 (1993) [hereinafter Lipkin, *Pragmatism—The Unfinished Revolution*].

41. Rawls, *The Law of Peoples*, *supra* note 12, at 74-77.

42. *Id.* at 44.

43. John Rawls, *The Domain of the Political and Overlapping Consensus*, 64 N.Y.U. L. REV. 233, 251 n.46 (1989).

44. Rawls, *The Law of Peoples*, *supra* note 12, at 42-43.

45. *Id.*

46. *Id.* For Rawls the law of peoples is "a political conception of right and justice that applies to principles and norms of international law and practice." *Id.* at 42. But Rawls notes an important "distinction between the law of peoples and the law of nations," or international law. *Id.* at 51.

According to Rawls:

The latter is an existing, or positive, legal order, . . . lacking, for example, an effective scheme of sanctions such as normally characterizes domestic law. The law of peoples, by contrast, is a family of political concepts with principles of right, justice, and the common good, that specify the content of a liberal conception of justice worked up to extend to and to apply to international law. It provides the concepts and principles by which that law is judged."

*Id.*

47. *Id.* at 42-43.

their political and social institutions meet certain conditions that lead the society to adhere to a reasonable law of peoples."<sup>48</sup>

Reasonable peoples living in well-ordered societies have no design on their neighbors.<sup>49</sup> They see government as legitimate because it is impartial and honors basic human rights including freedom of conscience. Basic human rights are central to well-ordered societies, whether liberal or nonliberal, and serve as a basis of distinguishing these societies from outlaw societies.<sup>50</sup> For Rawls, liberal societies should tolerate well-ordered societies, liberal or not, but they should eschew outlaw societies.<sup>51</sup> Nonliberal, hierarchical societies, however, are not necessarily outlaws and, though they might not be committed to liberal or democratic values, such societies can be well-ordered and can respect human rights.<sup>52</sup> Thus, they may participate in a reasonable law of peoples.<sup>53</sup>

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48. *Id.* at 43. Rawls stresses institutions since both basic rights and economic benefits rely on such institutions as the legal system, the police force, property relations and tax structure. See Thomas W. Pogge, *Liberalism and Global Justice: Hoffmann and Nardin on Morality in International Affairs*, 15 PHIL. & PUB. AFF. 67, 68 (1986) (stating that "different institutional arrangements engender very different (and rather stable) levels of crime, apathy, and political and economic equality").

49. For a society to be well-ordered, it must satisfy three conditions. First, the same principles of justice are known to be accepted by everyone. RAWLS, *POLITICAL LIBERALISM*, *supra* note 16, at 35. Second, the basic structure is publicly known to satisfy these principles of justice. *Id.* And third, every citizen has a sense of justice and generally complies with the basic institutions which are regarded as just. *Id.* Rawls insists these conditions can be met by nonliberal societies. See Rawls, *The Law of Peoples*, *supra* note 12, at 60-65 (discussing the requirements of a nonliberal well-ordered hierarchical society and how such a society adopts principles similar to those of a liberal society).

50. See Rawls, *The Law of Peoples*, *supra* note 12, at 68-71 (discussing the concept of human rights as they relate to the law of peoples). But aren't the notions of impartiality and human rights liberal notions? It is very likely that the background conditions of liberalism, if not liberalism itself, include these notions.

51. *Id.* at 42-43. Rawls fails to appreciate the possibility of a liberal society being expansionist, he does cite evidence that liberal societies never wage war against other liberal societies. *Id.* at 58. See Michael W. Doyle, *Kant, Liberal Legacies, and Foreign Affairs Part I*, 12 PHIL. & PUB. AFF. 205, 213 (1983) ("Even though liberal states have become involved in numerous wars with nonliberal states, constitutionally secure liberal states have yet to engage in war with one another."). But such evidence hardly establishes that all liberal societies must be well-ordered, or that they never engage in expansionist wars against nonliberal societies. See Michael W. Doyle, *Kant, Liberal Legacies, and Foreign Affairs, Part 2*, 12 PHIL. & PUB. AFF. 323, 337 (1983) (arguing that "liberalism does appear to exacerbate intervention against weak nonliberals and hostility against powerful nonliberal societies"). Consider colonial wars such as the Mexican War, the Spanish-American War, and American genocide against the indigenous American people. Indeed, Rawls ignores entirely the anti-war perspective that accuses the United States of waging, or supporting, expansionist wars against such nonliberal societies as North Vietnam, North Korea, Cuba, El Salvador, Grenada, Panama, Nicaragua, and Iraq. No doubt these examples are controversial. Nevertheless, Rawls should at least acknowledge the controversy.

52. Rawls, *The Law of Peoples*, *supra* note 12, at 43.

53. *Id.*

On the other hand, tyrannical or dictatorial regimes, such as Libya, North Korea, and Iraq are outlaws and cannot be included in a reasonable community of nations. What makes these countries outlaws are their disregard of basic human rights. For the purposes of this Article, Iran exemplifies an outlaw in the international setting. To the extent that Iran has failed to honor human rights, it has done so, let us assume, for conscientious reasons. Similarly, in domestic contexts, certain practices of Native American and other minority cultures continue to be considered outlaw practices even when motivated by conscientious reasons.<sup>54</sup>

In conclusion, Rawls attempts to ground international law in a liberal conception of global justice, while simultaneously explaining and justifying the toleration of nonliberal, well-ordered, hierarchical societies. Because only outlaws are unreasonable, only outlaw societies are excluded from Rawls reasonable community of peoples. Reasonableness, at every stage of Rawls argument, determines the direction, contour, and conclusion of his argument.

### C. *A Critique of Rawls' Rationalist Conception*

Rawls' conception of the law of peoples faces serious objections. First, Rawls' idea of a "well-ordered hierarchical society" is simultaneously too broad and too narrow. It is too broad because it arbitrarily requires a well-ordered society to possess certain critical features of a liberal society, such as freedom of conscience and basic human rights. It is not clear whether any actual nonliberal societies exhibit these features. Most nonliberal societies do not possess freedom of conscience or protect human rights to any great degree at all. Thus, Rawls' ad hoc characterization of well-ordered hierarchical societies appears to be biased, a construction deliberately created to demonstrate liberalism's concern with tolerance. Indeed, the idea of a well-ordered hierarchical society represents an oxymoron. Given the egalitarian elements in Rawls' conception of justice, hierarchies can be neither liberal nor well-ordered.

Rawls' choice of a test case illustrates this problem. Rawls never adequately explains the choice of the test case for demonstrating whether a well-ordered, hierarchical society should embrace and be embraced by a reasonable law of peoples. Why should such a society be one that already accepts freedom of speech and conscience? Why

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54. See, *Department of Human Resources v. Smith*, 494 U.S. 872 (1990) (denying the free exercise claim of Native Americans concerning the use of peyote in religious rituals). But see *Church of the Lukumi Babalu Aye v. City of Haileah*, 113 S. Ct. 2217 (1993) (invalidating a law designed to prohibit animal sacrifice).

not start out with the obviously more difficult case of the outlaw society, one rejecting such freedoms completely. Rawls would respond that a reasonable hierarchical society is the appropriate test case because if the liberal law of peoples cannot be extended to such societies, it has absolutely no chance of being extended to outlaw societies. This reply overlooks the fact that by starting with well-ordered, hierarchical societies, resembling liberal societies in important ways, Rawls stacks the deck in favor of liberalism. If reasonable hierarchical societies already look like liberal societies in important respects, then extending a liberal law of peoples to such societies is at best unilluminating, and at worst risks begging the question of what constitutional protections outlaw societies must accept to be included in the international community.<sup>55</sup>

In the eyes of the civil libertarian, the idea of a "consultation society" is anemic and misses the point of embracing freedom of speech and conscience.<sup>56</sup> Free speech is an individual, not a group, right. My right to free speech is not satisfied by my membership in a group that has the King's ear. The importance of free speech is not exhausted by its role in discovering the truth. Free speech also contributes to solidarity and mutual respect. In addition, free speech permits the individual to express herself and learn from others, and contributes to autonomy and self-realization. None of these values are achieved through a consultation society.<sup>57</sup>

Second, the idea of a hierarchical society is too narrow. Why must outlaw or not well-ordered societies like Iran be outside the reach of a

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55. Rawls might reply that the extension of the liberal conception of justice to hierarchical societies must be incremental. In other words, start with a hierarchical society that permits the extension, and then try to extend the political conception to less satisfactory hierarchical societies and so forth. In this way we hope to include more and more hierarchical societies until we either include all societies, or, what is more likely, we include many different kinds of societies, but exclude only hard-core outlaw societies. If the kind of society that resists extension is only that which we intuitively and reflectively deem an outlaw society, then we know the extension is complete. Moreover, we now understand why we call it an outlaw. The reason is that it fails to exhibit the type of features that permit its accepting and being accepted by a reasonable law of peoples.

56. Fernando R. Teson, *The Rawlsian Theory of International Law*, 9 ETHICS & INT'L AFF. 79, 94 (1995).

57. Further, it is difficult to know according to which criteria Rawls concludes that consultation is sufficient to satisfy free speech concerns. We need to know more about whether there will be a designated member of my group who will speak to the King and whether this designated member will listen to my complaints. In short, we need to determine whether the King will conscientiously listen to the views of my group and whether conceptually a designated member is sufficient to inform the King of the member's views. Moreover, what sort of inter-group communication must occur? And how is my right to free speech protected by such communications? Finally, many theorists believe the right to know is part of the right to free speech. How is this latter right protected in a consultation hierarchical society?

reasonable law of peoples. What non-circular argument excludes outlaws in this way? Rawls deploys the notion of reasonableness as a wedge against societies like Iran. His circular rhetoric regarding our differences with Iran maintains that Iran is unreasonable to hold steadfastly to its absolute imperatives, impervious to suasion from outside. But this is nothing more than a circular argument based on Western values and reasoning.

Third, the use of the original position in the context of the law of peoples is significantly different from its use in the context of domestic justice. This is because Rawls' new position concerning domestic justice depends on an actual public democratic culture of free and equal persons.<sup>58</sup> In international affairs, no such culture exists. Nor are the parties free and equal as they are in the domestic context.<sup>59</sup> Therefore, in the international context, for Rawls' argument to work it must describe general principles of reasoning having a hold on any rational person or nation.<sup>60</sup> However, this is just the eventuality Rawls' new conception of justice sought to avoid. In this case, what reasonable representatives would choose depends on a conception of reason that implies universality independently of the actual political conditions existing in the world in which the concept has currency. The simple truth is that, internationally, there exists no public culture of free and equal peoples, and therefore, if reasonable principles of international relations depend upon one, we have no hope of constructing such principles.<sup>61</sup>

Fourth, Rawls contends that in the international context a nation must embrace certain egalitarian principles, though they may be non-egalitarian domestically.<sup>62</sup> But, it seems doubtful that a "traditional"

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58. Even in the domestic context it is not clear what work the original position does. Instead, "why not just reason directly from our own widespread desire to engage in social cooperation to a system of tolerant political institutions that lets us do so." William Powers, Jr., *Constructing Liberal Political Theory*, 72 *TEX. L. REV.* 443, 452 (1993) (book review). Interestingly, defining reasonableness as a desire for social cooperation, skews the notion unjustifiably towards liberalism. The absolutist might not have such a desire, or if she does, she may not rank it high in her scheme of values. To say it is unreasonable not to have such a desire, or if one does, not to rank it higher than other values is clearly circular.

59. *But see* Thomas W. Pogge, *Cosmopolitanism and Sovereignty*, 103 *ETHICS* 48, 49 (1992) (asserting that a minimal conception of human rights "might, in our world, become the object of a worldwide overlapping consensus"). The reason to be skeptical about this prospect is the absence of a worldwide democratic political culture.

60. It must, therefore, appeal to epistemology or metaphysics, or both.

61. How does Rawls deal with a well-ordered hierarchical society granting an abundance of free speech protection, but little protection for freedom of religion? The inclusion of hierarchical societies opens a Pandora's Box of conundrums concerning whether a hierarchical society can be well-ordered.

62. Rawls, *The Law of Peoples*, *supra* note 12, at 64-65.



society not endorsing political and social equality domestically would genuinely endorse equality in its relations with other nations provided it could avoid doing so. How can nations both endorse and reject equality simultaneously? Rawls denies that there is any inconsistency in a traditional society embracing equality in its relations with other nations, but not domestically.<sup>63</sup> Correspondingly, he insists there is no inconsistency domestically in embracing political liberalism for public reason while rejecting it for one's comprehensive good.<sup>64</sup> According to Rawls, "[t]hough a society lacks basic equality, it is not unreasonable for that society to insist on equality in making claims against other societies."<sup>65</sup> But why not? And what does unreasonable mean in this context? It certainly seems that there is a likelihood of bad faith or inconsistency in insisting on equality in one area of life and not in others. Of course, one can say that such "inconsistency" is commonplace. A person might embrace equality in the political arena and not in raising one's children, or in law though not in church. Even if these examples work, they won't work in this situation. Both international and domestic contexts are *political* contexts and should be governed by the same principles. The only explanation of this difference is one of expediency, something Rawlsian theory cannot endorse.

There is something very troubling about Rawls' position here. If a society sanctions or requires inequality, then its endorsement of equality in the international context is disingenuous. It merely embraces equality strategically or instrumentally, not for its essential role in the concept of fairness. Such a hierarchical society embraces equality in the international context simply as a *modus vivendi* given its inability to enforce its values on other nations. And Rawls rejects a mere *modus vivendi* solution as illegitimate.<sup>66</sup>

Fifth, according to Rawls, justice and equality in the domestic context achieves its own stability because it will generate and sustain an overlapping consensus of competing comprehensive conceptions of the good.<sup>67</sup> It is not obvious, however, that the requisite kind of overlapping consensus is likely in the international setting. The possibility of an overlapping consensus on Rawls' political conception of justice may be "best suited to societies lacking significant social conflict and would be less likely than other principles to promote political stability

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63. *Id.* at 65.

64. *Id.* at 67.

65. *Id.* at 65.

66. RAWLS, POLITICAL LIBERALISM, *supra* note 16, at 147-49.

67. *Id.* at 140-44.

under conditions in which political stability is a real concern.”<sup>68</sup> Indeed, Rawls’ emphasis on those conditions that make democracy possible “limits his principles’ applicability to societies that are basically harmonious.”<sup>69</sup> Since the law of peoples applies to circumstances in which conflicts and outlaws abound, it is doubtful whether an overlapping consensus can be achieved there.<sup>70</sup>

To summarize: Rawls’ law of peoples attempts to forge an avenue between dogmatic liberalism—every people should have social systems just like liberal social systems—and the radical relativist position that any social system is equally good or bad. I suspect when the final chapter of Rawls’ theory is written, there will be a consensus that his theory simultaneously grants liberalism too much and too little scope. What remains interesting about Rawls’ theory is its dependence on the notion of reasonableness. Let us now turn to an examination of this issue.

## II. THE ROLE OF REASONABLENESS IN POLITICAL LIBERALISM AND IN THE LAW OF PEOPLES

### A. *A General Statement of Rawls’ Conception of Reasonableness*

For Rawls, a practical reasoner—someone possessing a sense of justice and a conception of the good—is reasonable when she is willing to negotiate with others over the basic terms of social life.<sup>71</sup> Such a person recognizes that others are similarly situated and that liberal democracies purport to encourage multiple conceptions of the good or what Rawls describes as the fact of reasonable pluralism.<sup>72</sup> The fact of pluralism in comprehensive doctrines differs from the fact of reasonable pluralism in that the former descriptively characterizes political societies whereas the latter declares such pluralism to be a normatively attractive feature of constitutional democracies when the different comprehensive doctrines are the result of freedom and autonomy and when these features generate different comprehensive doctrines that can coexist in a deep harmony with one another.<sup>73</sup>

Given the restrictions on political liberalism, the emphasis on autonomy, and the burdens of judgment, a liberal society should gener-

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68. George Klosko, *Rawls’ Argument From Political Stability*, 94 COLUM. L. REV. 1882, 1894 (1994).

69. *Id.* at 1895.

70. *Id.*

71. RAWLS, *POLITICAL LIBERALISM*, *supra* note 16, at 62.

72. *Id.*

73. *Id.* at 63-65.

ate or produce many reasonable comprehensive doctrines.<sup>74</sup> Unreasonable comprehensive doctrines—ones that are irrational, insane, or aggressive—ideally will not find a home in a liberal democracy. In Rawls' view, "clearly unreasonable conceptions of the good—intolerant, bigoted, or aggressive views—will be excluded from an overlapping consensus because their conceptions of the good are incompatible with liberal requirements of justice."<sup>75</sup>

Thus, reasonableness always refers to how an individual conducts her social interactions with others. The basic point is that a reasonable person will retain a conception of the good while ready to modify and revise principles of social interaction. Reasonableness essentially is the willingness to resolve social conflict, though not at all costs. Instead, the reasonable person recognizes that when no independent standard exists for determining the truth of competing comprehensive doctrines, she must compromise on the basic terms of social cooperation. The reasonable person is willing to avoid conflict by recognizing the burdens of judgment. A reasonable person desires "to be able to justify [her] actions to others on grounds [she] could not reasonably reject."<sup>76</sup> To be a reasonable person, you must be willing to modify and revise your comprehensive doctrine in light of a political conception of justice which seeks an overlapping consensus of all reasonable comprehensive views.<sup>77</sup>

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74. *Id.*

75. Samuel Freeman, *Political Liberalism and the Possibility of a Just Democratic Constitution*, 69 CHI.-KENT L. REV. 619, 643 (1994).

76. T. M. Scanlon, *Contractualism and Utilitarianism* in UTILITARIANISM AND BEYOND 103, 116 (Amartya Sen & Bernard Williams eds., 1982). However, it is not at all obvious what the content of this injunction is. What kind of principles can I reject only unreasonably? Political philosophy is concerned, among other things, with justifying principles of government. Reasonableness is used by Rawls and Scanlon to restrict the class of possible principles, yet such a strong concept of reasonableness seems unwarranted. This does not mean that their arguments are circular; in fact, justification might have different meanings as modifying principles of government as opposed to conceptions of reasonableness. But to avoid circularity the conceptions of justification and reasonableness must be spelled out in much greater detail. Rawls concedes this when he later writes, "I grant that the idea of the reasonable needs a more thorough examination than *Political Liberalism* offers." John Rawls, *Reply to Habermas*, 92 J. PHIL. 132, 150 (1995) [hereinafter Rawls, *Reply to Habermas*]. However, he takes it back by adding that "the main lines of the distinction between the reasonable and both the true and the rational are clear enough to show the plausibility of the idea of social unity secured by a reasonable overlapping consensus." *Id.* Because the idea of the reasonable drives the Rawlsian argument, a more comprehensive account of this concept is necessary.

77. Rawls' position depends on whether comprehensive doctrines and political conceptions can be unraveled in the appropriate manner. See Thomas McCarthy, *Kantian Constructivism and Reconstructivism: Rawls and Habermas in Dialogue*, 105 ETHICS 44, 52 (1994) (questioning whether political principles and values can be divorced from one's comprehensive views).

Rawls' invocation of reasonableness is designed to avoid a dependence on truth on the grounds that "there can be . . . one true comprehensive doctrine, . . . [but] many reasonable ones."<sup>78</sup> Viewing public reason to be based on truth "is exclusive, even sectarian, and so likely to foster political division."<sup>79</sup> Instead of truth, one begins with one's own society and describes the "political culture" of that society to determine whether certain kinds of people imbued with that culture have sufficient moral and political resources to live cooperatively together. According to Rawls, people are reasonable if they are inclined to propose and willingly live by principles of fair cooperation on the condition that others do the same.<sup>80</sup> Additionally, reasonable people accept "the burdens of judgment."<sup>81</sup> Reasonable people are also rational where this refers to a person's ends and the means she adopts to pursue them.<sup>82</sup> Summarizing, Rawls writes:

In a reasonable society, most simply illustrated in a society of equals in basic matters, all have their own rational ends they hope to advance, and all stand ready to propose fair terms that others may reasonably be expected to accept, so that all may benefit and improve on what every one can do on their own. This reasonable society is neither a society of saints nor a society of the self-centered. It is very much a part of our ordinary human world, not a world we think of much virtue, until we find ourselves without it. Yet the moral power that underlies the capacity to propose, or to endorse, and then to be moved to act from fair terms of cooperation for their own sake is an essential social virtue all the same.<sup>83</sup>

The idea appears to be that given a liberal democratic society of individuals separated by different comprehensive doctrines, the choice is social disharmony or some kind of accommodation.<sup>84</sup> Rawls uses the

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78. RAWLS, *POLITICAL LIBERALISM*, *supra* note 16, at 129.

79. *Id.*

80. *Id.* at 49. It is important to emphasize that ethical justification, according to Rawls, seeks truth, but political justification seeks reasonableness. Donald R. Korobkin, *Political Justification and the Law* 94 COLUM. L. REV. 1898, 1906-07 (1994). But according to Rawls, people are reasonable if they are inclined to propose and willingly live by principles of fair cooperation provided that others do the same. RAWLS, *POLITICAL LIBERALISM*, *supra* note 16, at 49. But then this becomes the truth of political justification. Although, according to Rawls, no comprehensive doctrine is true, it is nonetheless true that reasonable people will adopt the Rawlsian strictures of justification. Korobkin, *supra*, at 1907.

81. RAWLS, *POLITICAL LIBERALISM*, *supra* note 16, at 54-58 (describing the causes of reasonable disagreement).

82. *Id.* at 50.

83. *Id.* at 54.

84. Kant addresses a similar worry expressed in the following injunction for organizing civil society: " 'So order and organize a group of rational beings who require universal laws for their preservation—though each is secretly inclined to exempt himself from such laws—that, while their private attitudes conflict, these nonetheless so cancel one another that these beings behave publicly just as if they had no evil attitudes.' " IMMANUEL KANT, *PERPETUAL PEACE AND OTHER*

concept of reasonableness to show how a particularly deep accommodation can be achieved in such a society over a range of differing views of the good. The more mainstream views and peripheral views that join this deep accommodation, the more reasonable people will have reason to accept the accommodation. This remains true even if some conceptions of the good will be ruled out as unreasonable for not genuinely seeking to reason with others about the possibility of a deep accommodation.<sup>85</sup> The idea of "public reason" is the vehicle to seek solutions for disagreements with others by proposing, formulating, modifying and withdrawing one's own view on the condition that others are similarly motivated.

This conception of reasonableness has a great intuitive appeal; it appears to capture just what would occur in circumstances where a number of different people with different comprehensive doctrines require common rules for social interaction. Let me suggest, however, that the intuitive appeal applies only to an initial description of this situation; it evaporates once we start filling in the description in greater detail.<sup>86</sup> In the international context, reasonableness is likely to have even less force than it does domestically.

The idea of reasonableness is the single most important weapon in Rawls' arsenal in defense of his conception of justice, internationally as well as domestically. The force of the idea of overlapping consensus and the possibility of stability both rest on the idea of reasonableness as does the extension of the political conception of justice from liberal societies to reasonable, hierarchical societies. Consequently, we must critically scrutinize Rawls' conception of reasonableness in order to determine whether it can achieve the goals Rawls seeks. The fundamental problem with Rawls' political conception of reasonableness is that it is generally stated with varying degrees of circularity, and therefore will not persuade nonliberals, at home or abroad. When Rawls does formulate a noncircular conception of reasonableness it is unlikely to achieve the results he seeks.<sup>87</sup>

To understand the role of reasonableness in Rawls' philosophy, it will be helpful to present an intuitive conception of what criteria of

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ESSAYS 124 (1983). Kant emphasizes how civil society co-opts evil, while Rawls is concerned not with evil but rather with disagreement over the ultimate good.

85. Rawls' defenders do not appreciate the role "reasonableness" plays in his theory. Or if they do appreciate it, they believe that a sufficiently thick conception of reasonableness is available. See Freeman, *supra* note 75, at 643 ("Unreasonable conceptions of the good are not to be accommodated by justice; they are to be contained by it.").

86. See Leif Wenar, *Political Liberalism: An Internal Critique*, 106 ETHICS 32 (1995) (questioning Rawls' conception of reasonableness).

87. See generally, Rawls, *Reply to Habermas*, *supra* note 76.

adequacy a conception of reasonableness must satisfy. First, an adequate conception of reason must describe the *object* of reasonableness or to what reasonableness *applies*. For example, reasonableness can apply to people, political conceptions, agreements, and so forth. A conception of reasonableness that applies to more than a type of object raises the critical question whether the *same* conception of reasonableness is being used to describe different objects. Second, a conception of reasonableness must explain the relationship between reasonableness and *truth*. Is reasonableness a surrogate of truth or something else entirely? Third, what is the *source* of reasonableness? Does it derive from comprehensive doctrines? Or does it derive from common sense, language, thought, or by contrast, reasonableness may be simply a cultural or political conception? Fourth, what is the *epistemic* and *normative* force of the use of reasonableness in moral and political argument? Do principles of inference exist that *require* individuals to be reasonable? If so, which conception of reasonableness controls? The liberal's? Or the outlaw's? Finally, does the concept of reasonableness have substantive *content* or is it merely a procedural notion?

### B. *The Object of Rawls' Conception of Reasonableness*

Rawls' notion of reasonableness applies to practical reasoners, comprehensive doctrines, cultures, moral psychology, and the integration and balancing of public values, but it is not always apparent that reasonableness has a univocal meaning in these different contexts. The primary object of Rawls' conception of reasonableness is the individual practical reasoner. What is true of reasonable people is derivatively true of reasonable comprehensive doctrines and so forth.

When is an individual reasonable according to Rawls' theory? First, an individual is reasonable when she is inclined to act rationally according to her reasonable conception of the good, and has a sense of justice that prompts her to be just.<sup>88</sup> Second, a person is reasonable when she is willing to cooperate with others when others are ready to accept the same public principles for justifying the basic structure of society.<sup>89</sup> Third, for an individual to be reasonable she must accept the burdens of judgment—the reasons explaining why consensus is often unlikely—as restrictions on what can be justified to other peo-

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88. RAWLS, *POLITICAL LIBERALISM*, *supra* note 16, at 50.

89. *Id.* at 54.

ple.<sup>90</sup> In short, appreciating the burdens of judgment makes adopting a reasonable outlook imperative.

### C. Reasonableness or Truth?

If you impose your beliefs and values upon others because they are true, you make a claim open to everyone else, but "it is also a claim that cannot be made good by anyone to citizens generally."<sup>91</sup> If there is a dispute about whether state coercion is authorized in a particular case, the conclusion will appear arbitrary to those not sharing your conception of truth, or your beliefs about what makes a proposition true. This does not mean that no comprehensive views are true, or even that we cannot know the truth of a comprehensive view. Rather, it simply means that even if your comprehensive view is true, given the fact of pluralism, force will be required for you to "persuade" others of its truth. The liberal then faces the following choice: either risk coercion in imposing the correct comprehensive view on others, or seek a method for bringing about agreement on constitutional basics, while permitting people to act on their comprehensive views in their private lives.

Unfortunately, it is not clear that switching to reasonableness avoids the above problem. Rawls insists that the liberal conception of reasonableness is correct, not the outlaw's. But then Rawls is really saying that the liberal conception of reasonableness is true.<sup>92</sup> In doing so, Rawls does not obviate the necessity of truth; he merely camouflages its operation. Accordingly, Rawls' conception of reasonableness will not persuade those holding different conceptions of reasonableness or those who apply the same conception differently. Yet the "reasonable" liberal imposes her conception of reasonableness on outlaws anyway. Hence, these reasonable liberals act just as arbitrar-

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90. See *id.* at 54-58 (discussing the burdens of judgment). The burdens of judgment are the sources explaining reasonable disagreement. These sources include (1) the complexity of empirical factors relevant to a judgment; (2) the difference in weight placed on relevant empirical factors; (3) the indeterminacy associated with concepts and the need of interpretation; (4) the difference in life experiences and the effect this difference has on our judgments; (5) different kinds of normative factors with their concomitant difference in normative force generates different judgments; and (6) the difficulty in selecting the appropriate subset of values from the society's actual set of "cherished values" and the difficulty in determining the priority the values finally chosen. *Id.* at 56-57.

91. *Id.* at 61.

92. It might be argued that Rawls is concerned with stability, and, in contemporary society, stability will not be achieved unless a person's comprehensive view is reasonable, which means reviseable in light of the objections of others. Thus, Rawls is not concerned with truth because the truth of a comprehensive view does not ensure its contribution to stability. Only reasonable views can ensure such a contribution. The problem with this argument is that it fails to explain stability's normative force.

ily regarding outlaws when "reasonableness" is used to evaluate political judgments as when truth is used.

Rawls' notion of reasonableness is anathema to truth. Those individuals wedded to their comprehensive doctrines *because* the doctrines are thought by them to be true will be disinclined to substitute Rawls' conception of reasonableness for truth. Indeed, from their perspective, it is unreasonable to ask them to do so. Consequently, Rawls' conception of reasonableness will not satisfy proponents of truth in political theory nor will it satisfy antifoundationalists. It fails to satisfy because what is reasonable is compatible with what is false. Proponents of the truth in political theory typically contend that your view can be a candidate for the true view only if it is derived from a legitimate process of reasoning.<sup>93</sup> Proponents of truth tie reasonableness to truth. A person has a reasonable view only when that view is a candidate for the truth. A reasonable view can then be understood as a view that might be true though in present circumstances we cannot prove it true. Consider Hampton's observations:

[I]s it plausible to say that liberal understandings of freedom, equality, and tolerance are the *only* reasonable views one can have about human nature, relative human standing, and acceptable political practices? By saying this, Rawls is saying (as objectivist liberals would wish) not merely that antiliberals are wrong, but also that they do not meet the canons of acceptable reasoning. It is one thing to call your opponents wrong; it is quite another to say they hold their incorrect views only because they have been unable to form their beliefs in a fully rational and reasonable way. Such a position is far more insulting to the opponents of liberalism than is an objectivist liberal position, which admits the possibility that the opponents of liberalism can be reasonable and still disagree with them.<sup>94</sup>

Hampton is right with one qualification. Hampton's reference to "objectivist liberals" is dangerous for precisely the same reason the notion of reasonableness is. Both "reasonableness" and "objectivity," in varying degrees, are foundationalist terms that seek a second-order level of discourse that validates first-order moral and political judgments concerning what is right and wrong. Both terms imply an independent perspective from which to validate substantive political judgments. This type of reasonable person standard seeks an independent authority or methodology to validate substantive political judgments. Philosophers use "objective" in precisely the same way as Rawls uses

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93. Jean Hampton, *The Moral Commitments of Liberalism*, in *THE IDEA OF DEMOCRACY* 292, 308-09 (David Copp et al. eds., 1993).

94. *Id.*



reasonable; both terms represent a talismanic invocation to end debate.<sup>95</sup>

Philosophers advocating the use of reasonableness often implicitly (sometimes explicitly) endorse objectivity.<sup>96</sup> In their view, nonliberal positions, in addition to being unreasonable, typically fly in the face of objective facts, or are merely well-entrenched subjective views, while the liberal position is reasonable and objectively grounded. Unfortunately, it is not at all clear that objectivity can do the work that liberal philosophers hope it will do. Reasonableness and objectivity cannot shield us from the anxiety induced by failing to persuade our adversary with first order moral and political arguments. The liberal theorist's insistence that she is right and that nonliberals are wrong typically begs important questions concerning truth and justification as well as the question of who is right in the substantive controversy.<sup>97</sup>

#### D. *The Source of Reasonableness*

An adequate conception of reasonableness should explain the source or origin of reasonableness. Reasonableness might be derived from language, but Rawls never pursues this line and there is little independent evidence that it will succeed. It might also derive from common sense, or common history or those features of reasoning that are shared across cultures.<sup>98</sup> It is unlikely, however, that we will derive a univocal sense of reasonableness from these sources. Or, if we did, it will probably be true only relative to our culture. Correspondingly, reasonableness might also be dependent upon one's comprehensive views. If this is the concept of reasonableness employed, Rawls' project is doomed from the start. Reasonableness characterizes comprehensive views and cannot be true relative to such views. If they could, no overlapping consensus would be possible.<sup>99</sup> However,

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95. See Paul F. Campos, *Secular Fundamentalism*, 94 COLUM. L. REV. 1814, 1817 (1994) (explaining that for Rawls "reason functions as the master concept that transcends the enumeration of particular reasons").

96. Rawls contends that "it is definitive of reasonable agents that they recognize the essentials of objectivity." RAWLS, *POLITICAL LIBERALISM*, *supra* note 16, at 112.

97. Many legal philosophers have attempted to repudiate objectivity in legal argument. A notable example is RONALD DWORKIN, *LAW'S EMPIRE* 80-83 (1986).

98. There exists a perfectly legitimate common sense conception of reasonableness, namely, the reasonable person that we use uncontroversially in everyday life, one that "is found cross-culturally and in many historical eras . . ." CHRISTOPHER CHERNIAK, *MINIMAL RATIONALITY* 103 (1986). But, of course, common sense is often structured by one's culture. PHILIP J. REGAL, *THE ANATOMY OF JUDGMENT* 91 (1990). A substantial, cross-cultural conception of reasonableness would have tremendous value in grounding political theory.

99. According to Rawls' political liberalism "the political conception can be the focus of an overlapping consensus" of individuals having different, even incompatible, comprehensive views. RAWLS, *POLITICAL LIBERALISM*, *supra* note 16, at 141. In this view, each person's comprehen-

Rawls denies that reasonableness derives from one's comprehensive doctrines.<sup>100</sup> In fact, in his view, comprehensive doctrines conceptually tied to a conception of reasonableness are unacceptable. Miriam Galston succinctly expresses this point in the following:

Rawls denies the label "reasonable" to any comprehensive views that see political principles as derived from or dictating to moral, psychological, religious, or metaphysical views. Thus Rawls excludes from his democratic society any comprehensive view that sees political theory as part of and inseparable from a comprehensive view.<sup>101</sup>

Rawls' position appears to depend upon a general view about comprehensive doctrines, and that appears itself to be a comprehensive doctrine. Alternatively, "Rawls' political liberalism . . . is based upon a comprehensive view that posits the autonomy of political theory."<sup>102</sup> Rawls strategy of separating reasonableness from comprehensive doctrines must itself be a partial comprehensive doctrine for it to have the political force it requires. But if the doctrine has the political force required it will be unable to achieve its goal, since its force comes about only by eliminating the possibility of achieving an overlapping consensus. The reason for this is that "Rawls rejects comprehensive views that presuppose a single conception of the human good . . . but himself presupposes a single conception of the relationship between politics and the human good."<sup>103</sup> Just as Rawls' theory presupposes a unique conception of the relationship between politics and human good, it also presupposes a unique conception of reasonableness upon which this relationship depends.

To do the job Rawls desires, the concept of reasonableness must be independent of any particular comprehensive view.<sup>104</sup> At the same time, it must be possible to show how all comprehensive views or all

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sive doctrine can warrant the political conception of justice, or, at least, is not incompatible with this conception. *Id.* at 141-42. However, the class of comprehensive views—, for example, Locke, Mill and Kant among other similar views—is much too friendly to Rawls' agenda. See, for example, David Archard, *Fair Enough?*, 66 *RADICAL PHIL.* 47, 48 (1994). Indeed, "[t]he goal of a well-ordered society is easily reached when its disagreements are confined within a family of reasonable liberalism." *Id.* This problem is compounded in the international context since it is there that we are likely to confront illiberal cultures and outlaws.

100. See RAWLS, *POLITICAL LIBERALISM*, *supra* note 16, at 94 (stating that "the content of the reasonable is specified by the content of a reasonable political conception").

101. Miriam Galston, *Rawlsian Dualism and the Autonomy of Political Thought*, 94 *COLUM. L. REV.* 1842, 1851 (1994).

102. *Id.*

103. *Id.* at 1856.

104. However, as Professor Wolgast points out, it is not obvious that reasonableness can be independent of comprehensive doctrines. See Elizabeth H. Wolgast, *The Demands of Public Reason*, 94 *COLUM. L. REV.* 1936, 1941 (1994) (questioning Rawls' belief that reasonableness can be separated from comprehensive doctrines).

comprehensive views of a certain kind are committed to a particular conception of reasonableness. Rawls contends that reasonable comprehensive views will find the political conception of justice reasonable or at least not unreasonable.<sup>105</sup> But then the problem of the source of reasonableness becomes more urgent. What is it about reasonable comprehensive views that enable them to converge around such a complex, controversial conception of justice as Rawls'? Rawls' attempts to define a class of comprehensive views as reasonable by picking out just those liberal comprehensive views and those non-liberal comprehensive views that do not threaten liberal comprehensive views. He never really demonstrates why threatening nonliberal views are unreasonable or why unreasonableness must always trump conviction. That is, he never seriously argues against the outlaw in a non-circular manner.

Reasonableness, in Rawls' sense, fails to be a free standing concept unconnected to some comprehensive doctrine.<sup>106</sup> It is, therefore, difficult to see how it can triumph over domestic or international outlaws or even be neutral regarding their interests.<sup>107</sup> In fact, it could be argued that Rawls is simply intolerant of nonliberal attitudes.<sup>108</sup> The structure of Rawls' view appears to preclude such intolerance.<sup>109</sup> But it does not succeed. Rawls' notion of tolerance and reasonableness relies on the notion of free and equal persons living in a political culture.<sup>110</sup> It is then mysterious how this conception of reasonableness can be anything but a nonneutral comprehensive doctrine reflecting the values of a liberal democracy. This is a very narrow conception of reasonableness. Understood more broadly, outlaws can hold reason-

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105. Rawls' political conception of justice "admits of two justifications, a public one that is the same for everyone, and a nonpublic one, in terms of one's reasonable comprehensive view." Freeman, *supra* note 75, at 646 n.106.

106. One can argue that Rawls' conception of reasonableness is not supposed to be independent of one's comprehensive view. Rather, unless the various comprehensive views are each committed to the political conception of reasonableness social harmony is impossible. However, in the context of political argument and political justification this position has little normative force unless the parties believe that social harmony is more important than a commitment to their own comprehensive views. But if they do not, nothing more can be said. Certainly, calling such individuals unreasonable is either circular or pointless.

107. Neutrality is a very strong constraint, prompting Robert Frost to quip that the liberal cannot take his own side in an argument.

108. In fact, Rawls "has described a society that is tolerant of all but the intolerant . . . ." Lawrence E. Mitchell, *Trust and the Overlapping Consensus*, 94 COLUM. L. REV. 1918, 1933 (1994). See Campos, *supra* note 95, at 1826 (describing liberal ideologues as celebrating "tolerance and pluralism while at the same time condemning any meaningful dissent from their own thin idea of the good as not merely wrong, but contrary to the dictates of reasons itself . . .").

109. See Hampton, *supra* note 93, at 310-11.

110. Rawls views liberty and equality as independent values. In contrast, Walzer conceives of liberty and equality as interdependent. MICHAEL WALZER, *RADICAL PRINCIPLES* 255-56 (1980).

able comprehensive doctrines.<sup>111</sup> When understood more stringently, it is unclear why anyone not already committed to liberalism or views not incompatible with liberalism should be concerned with failing to be reasonable.

Rawls' conception of reasonableness is designed to constrain and determine "the substantive content of rational reflection."<sup>112</sup> Reasonableness functions as a test which comprehensive doctrines must first meet in order to qualify as a candidate for life in a pluralistic society. It ultimately determines which comprehensive doctrines are permissible. The problem with this view is that reasonableness is not a free standing concept; instead, it is a political and moral concept through and through. The type of reasonableness you embrace will be determined by your comprehensive doctrine. Consequently, it can only be one's comprehensive doctrine that permits one to act reasonably in Rawls' sense. No independent conception of reasonableness exists.

The point here is that the reasonable cannot be stated independently of the parties' comprehensive views.<sup>113</sup> What nations or peo-

111. *Id.* at 259.

112. CHANDRAN KUKATHAS & PHILIP PETTIT, *RAWLS: A THEORY OF JUSTICE AND ITS CRITICS* 132 (1990). In this view, "[t]he Reasonable (feasible) frames and subordinates the Rational (desirable)." *Id.* at 143. What we see here is that Rawls' conception of reasonableness serves as a kind of foundation for what is rational for people to desire. *Id.* In this manner, "[t]he Reasonable expresses the practical mode of pure reason." CORNELIUS F. MURPHY, JR., *DESCENT IN SUBJECTIVITY* 19 (1990). Giving reasonableness this grave responsibility requires providing a detailed analysis of the scope and content of reasonableness and how it operates to constrain people's desire. Rawls never provides this analysis. But without such analysis political liberalism is without foundation.

113. In fact, reasonableness follows from a modernist conception of value. Consider Toulmin's observations:

For 16th-century humanists, the central demand was that all of our thought and conduct be *reasonable* . . . [This] required toleration of social, cultural, and intellectual diversity. It was unreasonable to condemn out of hand people with institutions, customs, or ideas different from ours, as heretical, superstitious, or barbarous. Instead, we should recognize that our own practices may look no less strange to others, and withhold judgment until we can ask how far those others reached their positions by honest, discriminating, and critical reflection on their experience.

STEPHEN TOULMIN, *COSMOPOLIS: THE HIDDEN AGENDA OF MODERNITY* 199 (1990). Understanding reasonableness in this fashion renders political liberalism transparently tied to this humanist conception of the good. This does not, however, make it false. Indeed, it may in fact be true. But liberalism does not succeed in replacing truth with reasonableness. Instead, liberalism is dependent upon truth because reasonableness is dependent upon truth.

A more skeptical position concerning the rules of justice is attributed to Montaigne:

Our subjective, personal experiences are too various and incommunicable to be fit into general rules of conduct and the attempt to impose them tends to backfire. Far from reducing our cruelties, rules simply redirect and formalize our ferocity. Moreover, our thoughts and feelings are distorted by rules of language, our memories are altered by rules of interpretation, and our best moral inclinations are thwarted by social rules. Indeed, no rules that we could invent would be better because we remain both too

ples find reasonable will depend not on a conception of the right that is prior to the good, but instead on a developed, mature conception of the good which implicitly guides a nation's or a peoples' choice of reasonable principles for international interaction. In such circumstances we intuitively accept principles of the right or of international law. But as Charles Taylor observes "[i]f we were to articulate what underlies these intuitions we would start spelling out a . . . theory of the good."<sup>114</sup> For Taylor, "the good is always primary to the right."<sup>115</sup> In fact, "the good is what, in its articulation, gives the point of the rules which define the right."<sup>116</sup> The basis of reasonableness then can be seen as tied to some conception of the good. This might be an inchoate conception of the good, one not suited as a sophisticated moral theory, but it is a conception of the good nonetheless.

Of course, in a pluralist society that already has a tradition of liberalism, the comprehensive doctrines that develop probably will be liberalism friendly. Consequently, many of these comprehensive doctrines will generate a conception of reasonableness that is congenial to Rawls' conception. Nevertheless, this does not defeat the charge that reasonableness is relative to one's comprehensive view. Should strong antiliberal traditions develop in such a society, the liberalism-friendly conception of reasonableness will begin to break down. People will no longer consider their opponents part of the same society or community. People will begin to talk past one another and to regard their opponents as enemies. Arguably, such a breakdown in reasonable opposition is occurring in the United States today, especially in the debates over abortion, affirmative action, and the role of government largesse. However, even if reasonableness is possible and desirable in the context of the public culture of a demo-

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ignorant and too diverse to be fit into any single normative scheme. We are strangers, to one another and we are too ignorant to judge one another.

JUDITH SHKLAR, *THE FACES OF INJUSTICE* 26-27 (1990). Similarly, David Hume adds to Shklar's problem when he observes: "We are placed in this world, as in a great theatre, where the true springs and causes of every event are entirely concealed from us; nor have we either sufficient wisdom to foresee, or power to prevent those ills, with which we are continually threatened. We hang in perpetual suspense between life and death, health and sickness, plenty and want; which are distributed amongst the human species by secret and unknown causes, whose operation is oft unexpected, and always unaccountable." DAVID HUME, *THE NATURAL HISTORY OF RELIGION*, 28-29 (1957). Such skepticism concerning rules, normative schemes, and the course of experience create an enormous obstacle to constructing principles of justice between and among different nations and different peoples.

114. CHARLES TAYLOR, *SOURCES OF THE SELF* 89 (1989).

115. *Id.*

116. *Id.* Taylor's target is moral theory, and I would argue that what applies to moral theory *a fortiori* applies to political theory, although Taylor intimates some doubts about this last point. See *id.* at 87 n.60 (noting the differences between political and moral theory).

cratic society,<sup>117</sup> it is not obvious how this conception of reasonableness can be transposed to the law of peoples.<sup>118</sup> For in this latter context there is no public culture at all, or if there is, it is not one of democracy.<sup>119</sup> Thus, great danger exists in making the notion of reasonableness drive the Rawlsian engine of political liberalism.

Since Rawls' conception of justice "is an account of justice fitted to liberal, democratic theory, it is not an account suited to fight off allcomers."<sup>120</sup> Instead, it is an explication of a liberalism for liberals. The problem with this approach is that "Rawls stands to lose all normativity of his position and his theory amounts to no more than a complicated, albeit elegant, description of the sort of account of jus-

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117. Rawls now contends that the starting point for political liberalism is "certain fundamental ideas seen as implicit in the public political culture of a democratic society." RAWLS, *POLITICAL LIBERALISM*, *supra* note 16, at 13. A more general statement of Rawls' conception of political philosophy "when it presents itself in the public culture of a democratic society, is to articulate and to make explicit those shared notions and principles thought to be already latent in common sense; or . . . to propose to [common sense] certain conceptions and principles congenial to its most essential convictions and historical traditions." John Rawls, *Kantian Constructivism in Moral Theory*, 77 J. PHIL. 516, 518 (1980). On a cautionary note: those familiar with the difficulty in basing fundamental constitutional rights on the "conscience of the society" or "the traditions of the nation" might regard Rawls' strategy here with a great deal of skepticism. What does it mean to say that "certain fundamental ideas" are "seen as implicit in the public political culture of democratic society?" Similarly, what are *the* "shared notions and principles . . . latent in common sense?" Further, in what sense are "principles congenial to [common sense's] most essential convictions and historical traditions?" Without begging any questions, doesn't that culture include racism if not slavery? And aren't the "essential convictions and historical traditions" of some people and some groups inimical to Rawlsian liberalism. In other words, these remarks about "public culture" and "essential convictions and historical traditions" are contestable in the extreme. If so, how can it serve as the foundation for political liberalism? Must not we then follow Georgia Warnke when she observes that "[a]s members of a democratic culture our differences can extend beyond different ideas of the good and beyond different comprehensive religious, moral and philosophical doctrines to encompass different understandings of the meanings embedded in our shared political understanding?" GEORGIA WARNKE, *JUSTICE AND INTERPRETATION* 41 (1993). But see Michael Kelly, *Georgia Warnke, Justice and Interpretation*, 91 J. PHIL. 52, 56 (1994) (book review) (arguing that Warnke may have no way to resolve disagreement concerning hermeneutic political interpretations). In contemporary America, "[w]e are the heirs of many traditions, religious and secular, which cannot without gross self-deception be presented as forming a harmonious whole." Brian Barry, *Social Criticism and Political Philosophy*, 19 PHIL. & PUB. AFF. 360, 370 (1990) (book review). Indeed, in the law of peoples this assumes a special force, since there appears to be no international "public culture" to investigate.

118. In the case of the law of peoples, it is unclear what Rawls means by reasonableness. In the domestic context, however, Rawls believes that reasonableness depends on fairness in a practice of reciprocal cooperation. RAWLS, *POLITICAL LIBERALISM*, *supra* note 16, at 54. Everyone who enters into this cooperative practice must benefit, and all must share the burdens. Additionally, citizens recognize that reason cannot preclude all differences in comprehensive doctrines.

119. Unsurprisingly, the public culture of international relations has a decidedly Hobbesian or Spencerian tone.

120. MICHAEL LUNTLEY, *THE MEANING OF SOCIALISM* 144 (1990).

tice most liberals would endorse."<sup>121</sup> Turning the theory of justice towards a political, not metaphysical, justification renders it a "grand intellectual construction."<sup>122</sup> It works only if you are sufficiently liberal to allow it to work. The normative force required for persuading nonliberals to accept your argument is lost. Moreover, it has little chance of success in the context of the law of peoples where nonliberals abound.

### *E. The Epistemic and Normative force of Reasonableness*

What is the epistemic or normative force behind Rawls' conception of reasonableness? The epistemic force of a description provides a procedure for compelling, justifying, warranting, or persuading one's opponent or oneself that a certain controversy should be resolved in a certain way, or at least that it should *not* be resolved in some other way.<sup>123</sup> In its epistemic sense, the notion of reasonableness is tied to the conception of practical reason about political controversies.<sup>124</sup> It is designed as a method for determining the most plausible substantive resolutions of these controversies.<sup>125</sup>

How else can we understand the concept of reasonableness? The obvious alternative is that reasonableness is itself a political notion. As a political notion, reasonableness is dependent upon what a *consensus* of domestic or international society endorses as appropriate. Then, outlaw societies cannot be reasonable because by definition outlaw societies defy consensus. Nor can they be reasonable if reasonableness is a process peculiar to liberal, democratic societies and their allies. But neither conception of reasonableness is illuminating because neither conception illustrates the *normative* dimension of rea-

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121. *Id.*

122. *Id.* But see S.A. Lloyd, *Relativising Rawls*, 69 CHI.-KENT L. REV. 709 (1994) (defending Rawls' conception of justice against the objection that it merely provides a rationalization of our current intuitions concerning justice without attempting to show whether these intuitions are true).

123. But this places the cart before the horse. A proposal is reasonable only if we are justified in expecting others to accept it. The epistemic or normative force of "reasonableness" is designed to inform us what we are justified in expecting from our opponents.

124. RAWLS, *POLITICAL LIBERALISM*, *supra* note 16, at 118. The problem with tying justice to practical reason is that it creates an air of grounding justice in something universal, transhistorical and *a priori*. Some contemporary philosophers "take themselves to be representing the timeless form of practical reasoning as such, when they are in fact representing the form of practical reasoning specific to their own liberal individualist culture . . . ." ALASDAIR MACINTYRE, *WHOSE JUSTICE? WHICH RATIONALITY?* 340 (1988); see STEPHEN L. DARWALL, *IMPARTIAL REASON* (1983) (arguing that practical reason is fundamentally impartial rather than self-centered).

125. Rawls contends that reasonableness is only partly epistemic. RAWLS, *POLITICAL LIBERALISM*, *supra* note 16, at 62.

sonableness. A consensus, even a persisting consensus, does not explain the normative dimension of reasonableness because a consensus can be wrong. Moreover, if reasonableness is endemic only to liberal societies, its normative force dissipates in international contexts. Reasonableness can have an epistemic force only when it is based upon the appropriate rules of political inference and when such rules constrain political judgments. Rawls hedges on this issue. In *POLITICAL LIBERALISM*, Rawls contends that "being reasonable is not an epistemological idea (though it has epistemological elements)."<sup>126</sup> He is surely right about this. The concept of reasonableness is political through and through.

Because Rawls appears to use reasonableness epistemically, he needs to say just what the epistemic elements of the concept of reasonableness are. Is it that outlaw nations are somehow beyond the pale of reasoning or in some other way irrational?<sup>127</sup> If reasonableness is instead "part of a political ideal of democratic citizenship that includes the idea of public reason . . ." and "what free and equal citizens as reasonable [persons] can require of each other with respect to their reasonable comprehensive views,"<sup>128</sup> then the circularity of Rawls' position is obvious. In this event, reasonableness is tied, even

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126. *Id.*

127. Rawls tries carefully to distinguish between reasonableness and rationality. In one place Rawls describes reasonable persons as equals who "are ready to propose principles and standards as fair terms of cooperation and to abide by them willingly, given the assurance that others will likewise do so." RAWLS, *POLITICAL LIBERALISM*, *supra* note 16, at 49. By contrast, rationality "applies to a single, unified agent . . . with the powers of judgment and deliberation in seeking ends and interests peculiarly its own." *Id.* at 50. The idea of the rational, therefore, applies to the individual practical agent and the factors which guide her decisions. It "applies to how these ends and interests are adopted and affirmed, as well as to how they are given priority." *Id.* According to David Richards, the reasonable has a moral dimension while the rational does not. DAVID A. J. RICHARDS, *A THEORY OF REASONS FOR ACTION* 76 (1971). He writes "questions of rationality involve the agent's aims and the best way to realize them, whereas questions of reasonableness involve the assessment of the pursuit of one's own aims in the light of the morally justified claims of others." *Id.*

128. RAWLS, *POLITICAL LIBERALISM*, *supra* note 16, at 62. According to Rawls, "the reasonable, in contrast with the rational, addresses the public world of others." *Id.* The idea of reasonableness applies to people, nations, comprehensive views and so forth. It is never clear whether reasonableness is used in a univocal sense or, if not, how the different senses are related. Jeremy Waldron rightly points out that " 'reasonable' is a special, albeit ambiguous term in Rawls' vocabulary." Jeremy Waldron, *Justice Revisited*, *TIME LITERARY SUPPLEMENT*, June 18, 1993, at 5. For Waldron, the reasonable can be understood in two senses. The first sense indicates a citizen's willingness to modify her views and actions "in order to make possible social cooperation in terms of freedom and equality with others who may well hold different views." *Id.* The second sense interprets the reasonable as "intelligible in the light of the circumstances in which human reasoning is usually exercised." *Id.*



if only indirectly, to democracy, public reason, and the notion of a community of free and equal persons.<sup>129</sup>

Moreover, if reasonableness is understood as a normative notion, it is question begging to deny that outlaw societies can be reasonable in insisting on their expansionist policies. They certainly have *their* reasons, if not liberal reasons. Without further explanation, to call this process a pretense implies that some neutral vantage point exists from which to evaluate outlaw regimes and according to which their expansionist policies can be rejected.<sup>130</sup> However, Rawls hasn't presented such a standpoint, and there is independent evidence that none exists.<sup>131</sup> This does not mean that all reasons are equal, just that if reasonableness is needed to distinguish between good and bad reasons cross-culturally, an Archimedean perspective is required.<sup>132</sup> And Rawls has not provided one.

### F. *The Content of Reasonableness*

As far as the content of Rawls' conception of reasonableness is concerned, we know that reasonableness refers to reciprocity and the willingness to engage in social cooperation.<sup>133</sup> But we do not know when the content of such cooperation makes such willingness unreasonable. Moreover, we know that given the burdens of judgment,<sup>134</sup> the legitimate sources of disagreement, people can faultlessly arrive at different conclusions, and therefore, none of these conclusions are necessarily unreasonable. But we know very little else. What synonym, or alternative locution, can explain "reasonableness" for Rawls? Could his conception of justice be written without using the word "reasonable?"

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129. Democracy and liberty can at times conflict, and therefore, on contractualist grounds there might be a presumption in favor of liberty over democracy. *But see* Peter de Marneffe, *Contractualism, Liberty, and Democracy*, 104 *ETHICS* 764 (1994) (arguing that democracy and liberty can be equally acceptable to rational contractors and could conceivably be balanced "in a way that favors democracy").

130. Simply calling the outlaw's view wrong, however, presupposes no such perspective.

131. This does not imply relativism in politics, nor ethical skepticism. Their reasons are not our reasons, and we have every right to condemn their reasons as morally wrong. Let's just be clear on what we're doing. They make no mistake other than a substantive moral mistake. Certain different moral judgements derive from different moral perspectives. But since our perspective is at least as good—or bad—as anyone else's, we should not refrain from expressing our moral condemnation. Of course, everything just said about our moral judgements and moral perspective can be said equally of the moral perspectives and moral judgments of outlaws.

132. An Archimedean perspective is a formal, neutral, value-free viewpoint from which to examine substantive judgments.

133. RAWLS, *POLITICAL LIBERALISM*, *supra* note 16, at 49-50. Reasonable persons are moved by a desire to cooperate on the basis of a social order from which reciprocity will benefit all engaged in the cooperative scheme. *Id.*

134. *Id.* at 54-58 (describing the causes of reasonable disagreement).

These are not rhetorical questions. The role reasonableness plays in Rawls' law of peoples and in his conception of public reason deserves much more explanation than Rawls gives it.<sup>135</sup>

Reasonableness might refer to such qualities as a democratic civility, and a willingness to compromise.<sup>136</sup> But neither of these traits of moral personality will do the work required to derive a liberal theory of justice, or a liberal law of peoples. Rawls needs the idea of reasonableness to apply across different comprehensive world views but it seems that the reasonable can be understood only relative to particular comprehensive views. To put it differently, the concept of reasonableness, at its Rawlsian best, applies to the public culture of democracies where free and equal people strive to achieve social cooperation. However, this way of characterizing Rawls' notion of reasonableness is again simultaneously too broad and too narrow. It is too broad because there is very little agreement on what this public culture implies for controversial issues. It is too narrow because it arbitrarily excludes nonliberal cultures *ab initio* simply because they eschew democracy or human rights.

Rawls is not alone in relying on reasonableness in political theory. Thomas Nagel believes that a political arrangement is legitimate only when agreement would occur if the parties "were also reasonable and committed within reason to modifying their claims, requirements, and motives in a direction which makes a common framework of justification possible."<sup>137</sup> Three kinds of reasons exist in Nagel's political framework: each of us is or should be partial to herself, impartial to-

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135. At one point Rawls argues that "[t]he only comprehensive doctrines that run afoul of public reason are those that cannot support a reasonable balance of political values." *Id.* at 243. In a footnote Rawls argues that "any comprehensive doctrine that leads to a balance of political values excluding [the] duly qualified right [to abortion] in the first trimester is to that extent unreasonable . . ." *Id.* at 243 n.32. Rawls needs a better explication of reasonableness if it is to function as a grounding for such controversial substantive conclusions. See Mitchell, *supra* note 108, at 1933 (stating that Rawls' has not made a case for pluralistic democratic society at all, but rather has described a society that is tolerant of all but the intolerant). Stuart Hampshire suggests that political liberalism's notion of the reasonable should apply to procedures of legislation and adjudication, and leave the evaluation of outcomes alone. Stuart Hampshire, *Liberalism: The New Twist*, N.Y. REV. OF BOOKS, Aug. 12, 1993, at 43, 44-46.

136. *Id.* at 44. Hampshire admonishes us to "feel some awe or fear (*Actung*) before these magnificent words 'reason' and 'unreasonable' are brandished in front of us in Kantian style." *Id.* at 45. And Hampshire further indicates that "[n]owhere is there evidence . . . of a sovereign reason which can secure a consensus, the end of conflict, a uniform order, a harmony of interest, the heavenly city of the philosophers." *Id.* at 46. Reason doesn't appear to have the potency of achieving even Rawls' more modest goal.

137. THOMAS NAGEL, *EQUALITY AND PARTIALITY* 33-34 (1993). Nagel claims that this is "an application of the Kantian unanimity criterion simultaneously to political institutions and to the individual lives of their members." *Id.* at 34.

wards everyone, and "respectful of everyone else's partiality."<sup>138</sup> Reasonableness comes into play when we adopt these three different kinds of reasons. When our reasons for adopting a principle as part of the basic structure of society are skewed unduly in any of the three directions, we are being unreasonable.

What makes it reasonable for someone to reject a system, and therefore makes it illegitimate, is either that it leaves him too badly off by comparison with others (which corresponds to a failure with respect to impartiality), or that it demands too much of him by way of sacrifice of his interests or commitments by comparison with some feasible alternative (which corresponds to a failure with respect to reasonable partiality).<sup>139</sup>

Nagel doesn't pretend to provide a substantive standard of reasonableness, and that is just the problem with such a general or formal account of reasonableness. Unless we explain when a system leaves us too badly off or asks too great a sacrifice we have no idea when a solution is reasonable. Nagel complicates the issue by insisting, for example, that the poor may reasonably require more from the rich while recognizing that the rich are reasonable in refusing.<sup>140</sup> For Nagel, "resistance to a reasonable aim may itself be reasonable."<sup>141</sup> Of course, "[i]t is only when we speak of reasonable *solutions*, or proposals, or requests, that imply that it would be unreasonable for any party to the issue to reject them."<sup>142</sup> Nagel elaborates that, "[r]easonable persons may however fail to converge on a solution that is reasonable *tout court*, without finding one another unreasonable."<sup>143</sup> No reasonable solution exists when two people need the same life jacket. And neither person is unreasonable to try to get it for herself.<sup>144</sup>

Although, it is obvious that this conception of reasonableness plays a great role in Nagel's political theory, it is not obvious what this role is. The difficulty is not merely due to the need for a substantive component of reasonableness. Unless we know what a person deserves we cannot say when a solution leaves someone badly off or when he is asked to make too great a sacrifice. The question of what a person justifiably should expect of a social arrangement cannot be helped by the concept of reasonableness, because that concept presupposes we

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138. *Id.* at 38.

139. *Id.* at 38-39.

140. *Id.* at 172.

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

already have the answer to the question of what he should expect. In contexts of strangers and outlaws the concept of reasonableness appears either anemic or circular. In fact, Nagel's use of reasonableness as implying the possibility that it might not be unreasonable for someone to resist a reasonable solution seems compatible with certain forms of skepticism about the efficacy of moral and political reasoning.<sup>145</sup>

### G. Reasonableness and Tolerance In Rawls

The above problems with Rawls' conception of reasonableness distort his conception of tolerance.<sup>146</sup> In *POLITICAL LIBERALISM*<sup>147</sup> Rawls spends considerable time explicating the concept of reasonableness and its relationship to rationality. Unfortunately, in this context, Rawls is concerned with a liberal democratic society such as the United States. Rawls describes people in this context as those with a sufficient degree of moral development "to be free and equal citizens

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145. See, e.g., Lipkin, *Beyond Skepticism*, *supra* note 9 (arguing that modified skepticism indicates that there are at least three fundamentally different conceptions of a person grounding three fundamentally different political perspectives each of which implies different (incompatible) solutions to controversial moral and political controversies). For an important discussion of the conception of a person in Rawls' theory of justice see generally Frank Michelman, *The Subject of Liberalism*, 46 STAN. L. REV. 1806 (1994) (Book Review).

146. The undefended use of reasonableness obscures an alternative route to toleration. We are norm constructing (and deconstructing) animals, and tolerance should be predicated on first understanding the other fellow's norms. Michael Walzer makes a similar point when he writes: "We are (all of us) culture-producing creatures; we make and inhabit meaningful worlds. Since there is no way to rank and order these worlds with regard to their understanding of social goods, we do justice to actual men and women by respecting their particular creations." MICHAEL WALZER, *SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY* 314 (1983). But does it follow that justice requires respecting the norms of others? All others? How is that justice? It seems Walzer's point is that we should *tolerate* the norms of others. As Charles Beitz puts this point:

Efforts to make even-handed judgements about actions or policies that affect persons located in different communities can therefore achieve what is at best an illusory impartiality; they will always be infected by the parochialism of the conceptions of harm and benefit to which they refer. In the face of this fact, the most that can be said about the relations among communities is that they should be based on a principle of tolerance of diversity — not because diversity has some special, non-local value but because there can be no basis for imposing any other requirements.

Charles Beitz, *Sovereignty and Morality*, in *POLITICAL THEORY TODAY* 236, 251 (David Held ed., 1991). Unfortunately, Beitz's conclusion is a *non sequitur*. Because impartiality is illusory, it does not follow that we should embrace tolerance. An additional premise is needed to yield Beitz's conclusion. One can just as well assert that in the face of illusory impartiality we should all put forth our conceptions of the good in the most favorable light hoping to persuade others, or that we should abandon concerns about the good and try to get along with others on a case by case basis, or that we should abandon such (liberal?) attempts and instead wage war. Beitz's conclusion needs additional support beyond reference to the illusions of impartiality.

147. RAWLS, *POLITICAL LIBERALISM*, *supra* note 16.

in a constitutional regime, and who have an enduring desire to honor fair terms of cooperation and to be fully cooperating members of society."<sup>148</sup> Such a description cannot be transposed to the law of peoples.

Reasonableness depends on a motivational constraint, namely, an equal desire among members of a group of contractors for social cooperation.<sup>149</sup> When this desire is not equal, charges of unreasonableness have little or no motivational force. What is necessary here is to show that it is unreasonable not to have a sufficiently strong desire for social cooperation without begging the question, or providing only a very weak motivational reason for embracing Rawls' results.<sup>150</sup> Moreover, in the international context not having an equally intense desire for social cooperation might be reasonable (or not unreasonable) given each contracting representative's domestic political culture. A political culture deep enough to create an epistemically useful conception of reasonableness does not arise by divine intervention simply because the parties are willing to negotiate.

Arguably, reasonableness might be derivable from values latent within the political culture of a democratic society.<sup>151</sup> This political derivation is a substitute for a metaphysical or epistemological derivation.<sup>152</sup> But if Rawls' conception of reasonableness rests on its latency within a political culture, then his derivation of the principles of justice in domestic settings must differ from its derivation in the context of the law of peoples unless Rawls can validate the dubious contention that international contexts exhibit a thick enough "political culture" to make the same derivation possible. If not, then Rawls faces the pecu-

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148. *Id.* at 55.

149. RICHARD MILLER, *MORAL DIFFERENCES: TRUTH, JUSTICE AND CONSCIENCE IN A WORLD OF CONFLICT* 354 (1994).

150. Bruce W. Brower, *The Limits of Public Reason*, 91 J. PHIL. 5, 15 (1994) (arguing that a person might be susceptible to Rawls' arguments only if he already accepts the contractarian ideal of the reasonable person).

151. Even here it is unclear whether a common culture exists. See Stanley Fish, *Liberalism Doesn't Exist*, in *THERE'S NO SUCH THING AS FREE SPEECH, AND ITS A GOOD THING TOO* 134 (1994).

152. Rawls' attempt to accommodate a diversity of comprehensive doctrines suggests an affinity "with the *pragmatism* of American thinkers like William James and John Dewey." KUKATHAS & PETTIT, *supra* note 112, at 148. But see WARNKE, *supra* note 117 at 58 ("Rawls' model conceptions may just be too one-sided to accomplish the pragmatic task he sets for them."). It is important to note that a pragmatic conception of American justice should include the important, systemic differences in interpretation. *Id.* In short, "it might be argued that while we might draw different and contending model conceptions from our public political culture, it is important that these are rival pictures of what our traditions mean and not rival philosophical, moral or religious doctrines." *Id.* at 61. Is there a reliable procedure for drawing this distinction?

liar and unenviable position of maintaining a historicist derivation of the principles of justice in the domestic context, together with a metaphysical or epistemological derivation in the international context. Rawls simultaneously "seeks theoretical foundations free from the contingencies of any particular society and time, and yet also wishes to articulate the underlying ideals of modern Western liberal democracies."<sup>153</sup> Arguably, reasonableness is a political concept in the domestic context, while its force in the international context depends upon general principles of reasoning and inference.

In domestic contexts we can argue that in certain circumstances where people share certain commitments, such as freedom, equality, and an enduring desire to honor "fair terms of cooperation,"<sup>154</sup> a liberal conception of justice makes sense. But this approach will hardly suffice for a law of peoples.

Even domestically, it is a nonetheless promising approach with one critical caveat. Whenever people have shared commitments, using them to generate political or moral judgments is useful just so long as the commitments stay firm. In fact, however, the interpretation of such commitments is indeterminate and contestable, and therefore using them to ground moral and political judgments often is problematic. Disagreement can arise at every turn.<sup>155</sup> People in this context are likely to have very different conceptions of "freedom" and "equality." Indeed, American constitutional law is the history of controversial readings of these values.

When this approach breaks down, if we unsuccessfully try to start it up again by reworking the arguments, there is little more to be said. The idea of reasonableness in this context itself will be a source of breakdown. We will be unable to appeal to a univocal sense of reasonableness. The term might help achieve or rationalize some agreement, but only in those cases where the agreement is firm and therefore reasonableness is virtually superfluous. In truly controversial cases, reasonableness will be ineffective because we cannot ground the basic structure of society in reasonableness without begging the question.

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153. Archard, *supra* note 99, at 48.

154. WARNKE, *supra* note 117, at 48.

155. Regarding philosophy, Rawls recognizes that "[w]hat is obvious to some persons and accepted as a basic idea is unintelligible to others." RAWLS, *POLITICAL LIBERALISM*, *supra* note 16, at 53. What's true about philosophy is even more true of politics. Consequently, it is doubtful that the idea of reasonableness will be useful in finding solutions to what most Americans find controversial.

The problem any adequate conception of reasonableness faces is this: Liberalism's use of reasonableness implicitly requires a conception of reasonableness that it would be unreasonable to reject. The force of this objection is revealed in Brian Barry's argument for liberal neutrality.<sup>156</sup> Barry argues that everyone could reasonably reject a privileged conception of the good in a society's constitutional structure because "they could reasonably reject any constitutional arrangements that put their own conception at a disadvantage."<sup>157</sup> Barry concludes that "neutrality merges as a kind of equilibrium: It doesn't give anybody the whole of what they would like, but it gives everybody as much as they can reasonably demand."<sup>158</sup> But why can't someone "reasonably demand" more? If one is convinced that her conception of the good is true, it would be unreasonable to demand less.<sup>159</sup> Barry invokes a "moderate skepticism" to press this point home. We can either impose an uncertain conception on others or embrace neutrality in political thought.<sup>160</sup> But it is unclear why we face this dilemma. Further, given the dilemma, it is uncertain why we should choose the standard liberal alternatives concerning neutrality.<sup>161</sup>

Barry never addresses the question of why one could not reasonably reject his conception of reasonableness. Presumably, for Barry, a person is unreasonable or unreasonably rejects a conception of justice when it does not disadvantage her conception of the good anymore than it disadvantages other conceptions of the good. No matter how palatable to the Western mind such a conception of reasonableness is, Barry never explains why it would be unreasonable to reject this conception. If I claim to know that my conception of the good is true and certain, or if I at least know that your view is false, then I might be foreclosed from accepting a conception of justice that disadvantages

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156. Brian Barry, *In Defense of Political Liberalism*, 7 *RATIO JURIS* 325, 328-9 (1994); see Scanlon, *supra* note 76.

157. *Id.*

158. *Id.* at 329.

159. Cf. NAGEL, *supra* note 137, at 168.

160. Onora O'Neill formulates a weaker, and therefore probably a more palatable, version of Barry's injunction. Onora O'Neill, *Practical Reason and Possible Community: A Reply to Jean-Marc Ferry*, 7 *RATIO JURIS* 308, 311 (1994) ("We act unreasonably when we use or rely on principles which we hold to be unfollowable by others. And indeed, how could we use any such principles to communicate with or reason with those for whom we think those very principles unusable?"). O'Neill must specify in detail just what the content of "unfollowable" and "unusable" are for this point to be persuasive.

161. Barry also insufficiently addresses the issue of whether his argument for neutrality results in a vitiation of the concept of politics by distorting the elements of power, exclusion and hegemony upon which this concept depends. Chantal Mouffe, *Political Liberalism: Neutrality and the Political*, 7 *RATIO JURIS* 314, 319, 321 (1994).

my conception of the good, even when it equally disadvantages other conceptions.<sup>162</sup> Barry's (and Rawls') approach assumes that reasonableness incorporates as central elements equality and moderate skepticism. Why must we assume this?

Moreover, short of demonstrating that there exists a univocal conception of reasonableness, any conception of reasonableness is bound to be political. If we do assume some notion of equality, then our use of reasonableness in deriving liberal principles of justice is circular-not simplistically circular, but circular nevertheless. Since Barry (and Rawls) place great emphasis on equality in their conceptions of justice, appealing to equality in basing justice on reasonableness ultimately assumes the very question the liberal must answer: Why should society be organized around principles of equality? By not addressing the question of whether his conception of reasonableness is itself reasonable, Barry simply begs the question against political liberalism's critics.

The problem of reasonableness in political liberalism is tied to the disclaimer that liberalism includes a conception of the good. If liberalism contains a conception of the good that implies a conception of reasonableness, it then cannot claim to be neutral with respect to the good or to embrace a neutral conception of reasonableness. Rawls insists that the concept of the right and the concept of the good are independent. Alasdair MacIntyre eloquently disparages the independence thesis. MacIntyre contends, straightforwardly, that liberalism contains a conception of the good, and therefore, we can infer from MacIntyre's position that liberalism also is or includes a comprehensive doctrine.

The principles which inform such practical reasoning and the theory and practice of justice within such a polity are not neutral with respect to rival and conflicting theories of the human good. Where they are in force they impose a particular conception of the good life, of practical reasoning, and of justice upon those who willingly or unwillingly accept the liberal procedures and the liberal terms of debate. . . . Moreover, liberalism can provide no compelling arguments in favor of its conception of the human good except by an appeal to premises which collectively already presuppose that theory. The starting points of liberal theorizing are never neutral as between conceptions of the human good; they are always liberal starting points.<sup>163</sup>

Brian Barry disparages MacIntyre's claim by observing:

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162. A person holding such a view denies the relevance of the fact that other conceptions are equally disadvantaged. Moreover, such a person would not qualify her position in this way.

163. MACINTYRE, *supra* note 124, at 345.



MacIntyre can hardly complain about a tradition's imposing its own 'conception of the good life, of practical reasoning, and of justice' on everyone, since the Aristotelian, Augustinian, and Thomist traditions he thinks well of do exactly that—indeed, that is the point of them. The complaint must therefore be that there is some objection to liberalism in particular having these features, but MacIntyre doesn't tell us what it is, and I am unable to see that there is any. That the formula of equality plus neutrality is incompatible with, say, a theocracy . . . is so patently obvious that it would have to be a very fainthearted liberal who was embarrassed by the fact.<sup>164</sup>

Barry fails to realize that liberalism's dependence on a conception of the good is surprising and troubling because liberalism is supposed to be neutral with respect to the good.<sup>165</sup> Liberalism then needs to explain why it may so cavalierly preclude theocracies and other conceptions of the good. Barry's liberalism appears to clearly reject neutrality which is the centerpiece of many versions of political liberalism.

Perhaps the neutrality position can be reformulated to say that liberalism is attractive especially in a democratic society because it permits the articulation and implementation of a greater number of conceptions of the good than alternative theories of justice. Because the goal of liberalism (or liberalism's good) is to permit reasonable individuals to choose their own good, democrats will have more reason to embrace liberalism than other conceptions. This characterization emphasizes the importance of liberalism as a *democratic* conception. But it does give up the notion of neutrality, that is, it gives up the idea that liberalism is just a political notion and not a full blown conception of the good life.

The point here can be expressed, following Joseph Raz, that "[a]utonomy is a constituent element of the good life."<sup>166</sup> Far from being neutral, "[g]overnments are subject to autonomy-based duties to provide the conditions of autonomy for people who lack them."<sup>167</sup> Consequently, "a government whose responsibility is to promote the autonomy of its citizens is entitled to redistribute resources, to provide public goods and to engage in the provision of other services on a compulsory basis . . . ."<sup>168</sup> Thus, according to Raz, governments have

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164. Brian Barry, *The Light that Failed?*, 100 *ETHICS* 160, 167 (1989) (book review).

165. Barry disparages the claim because how could liberalism be neutral with respect to the good when in fact it rejects certain conceptions of the good. Liberalism needs another way to characterize its relationship to the good and its claim to neutrality.

166. JOSEPH RAZ, *THE MORALITY OF FREEDOM* 408 (1986).

167. *Id.* at 415.

168. *Id.* at 417.

a *nonneutral* role in preserving and enhancing the liberal virtues of freedom and autonomy.<sup>169</sup>

### H. Rawls On Human Rights

Rawls contends that any reasonable society will embrace human rights, including "such basic rights as the right to life and security, to personal property, and the elements of the rule of law, as well as the right to a certain liberty of conscience and freedom of association, and the right to emigration."<sup>170</sup> The role Rawls gives to human rights is simultaneously too broad and too narrow. His conception is too broad because Rawls gives no reasons, other than liberal reasons, for tying reasonableness to human rights. Why must every "reasonable" society honor human rights? What about a society whose culture and religion eschew human rights as the liberal conceives them? What if its people are perfectly satisfied with the absence of human rights? Why should a society whose people do not clamor for human rights necessarily be unreasonable? Rawls' conception works only if he can provide some *general* non-liberal reason for insisting on human rights.

Rawls might reply that the above skeptical argument is question begging because it implies that any society honoring human rights is a Western society even if it is significantly different from western societies in important ways, such as, it is non-democratic, non-egalitarian, or non-meritocratic. This criticism would be accurate if the argument used the similarity in human rights as an argument entailing or implying their identity as Western. Instead, the above argument is a skeptical challenge querying why a non-Western society must honor human rights to be reasonable. In short, the argument casts doubt on the claim that there are other non-Western values that underlie the impor-

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169. *Id.* MacIntyre insists that "[t]he overriding good of liberalism is no more and no less than the continued sustenance of the liberal social and political order." MACINTYRE, *supra* note 124, at 345. In a trivial sense everyone's conception of the good tends towards self-perpetuation. But this does not mean that everyone has two goods, for example, utilitarianism and the preservation of utilitarianism. In other words, we cannot nontrivially contend that the continued existence of liberalism is the good of liberalism. If that is so, it applies equally to any conception of good or conception of justice. Liberalism could resurrect itself if it could show how reasonableness and fairness are independent of any comprehensive (substantive) view. If so, liberalism has a conception of the good only in a trivial sense, not in the sense that precludes neutrality. Unfortunately, as Raz indicates, since autonomy is an essential feature of the good life, liberalism is and should be nonneutral with respect to the good. RAZ, *supra* note 166. Moreover, autonomy, in Raz's sense, seems conspicuously tied to fairness and reasonableness. A person valuing autonomy and freedom for everyone would necessarily have a predilection for distributing freedom fairly and guiding his interactions with others in a reasonable manner. This conclusion is fortified by acknowledging liberalism's conception of the good; it is weakened by the neutrality approach.

170. Rawls, *The Law of Peoples*, *supra* note 12, at 68.

tance of human rights. Rawls' conception is too narrow because from a Western perspective it appears to guarantee only *basic* rights. In short, in Rawls' view, some very nasty countries might be reasonable.

Rawls rejects the charge that "the liberal law of peoples is ethnocentric and merely Western."<sup>171</sup> According to Rawls, "[t]he liberal conception asks of other societies only what they can reasonably grant without submitting to a position of inferiority, much less to domination."<sup>172</sup> But whose conception of inferiority do we appeal to? Rawls fails to acknowledge the problem of determining whether we must tolerate the intolerant, and if we must, whether there is some inter-subjective process for determining when we may justifiably fail to tolerate the intolerant. A nation that is expansionist for conscientious reasons cannot realistically be expected to forego these doctrines because the liberal conception of the law of peoples says so. It is not enough that Rawls acknowledges that "a liberal conception of the law of peoples [does] not ask well-ordered hierarchical societies to abandon their religious institutions and adopt liberal ones."<sup>173</sup> Rawls seems to imply that as far as domestic justice is concerned, such societies need not be liberal. But the liberal conception of the law of peoples "asks of other societies only what they can accept once they are prepared to stand in a relation of equality with all other societies and once their regimes accept the criterion of legitimacy in the eyes of their own people. In what other relations can a society and its regime reasonably expect to stand?"<sup>174</sup>

But this argument is entirely circular. Liberalism asks other societies to accept strong liberal constraints on its relations with other societies. After all, how else can an outlaw society reasonably (read liberally) expect to interact? In short, the liberal conception of the law of peoples asks outlaws to become partially liberal and that, according to Rawls, is not too much to ask.

Rawls insists that "to affirm the superiority of a particular comprehensive view is fully compatible with affirming a political conception of justice that does not impose it. . . ."<sup>175</sup> That is no doubt true. But it does not address the outlaw's position that it may hold a comprehensive view that it betrays if it does not impose it. No doubt this will be an unpopular view in liberal circles. But that does not show that the outlaw violates some neutral canon of rationality, practical reasoning,

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171. *Id.* at 79.

172. *Id.*

173. *Id.* at 79-80.

174. *Id.* at 80.

175. *Id.* at 81.

or judgment. One person's reasonableness is another's cowardice. We will not begin to understand how to resolve international conflicts until we realize that some of the most intractable conflicts have no *reasonable* solutions.

One way out for Rawls is to embrace the ethnocentricity of his position. Rawls' conception of public reason as it applies to the law of peoples is a Western value. But that is no vice. We must always start from our perspective. Should other nations have a better conception—better defined as what is attractive after all the complaints are heard—then let's hear it. But until that time we should continue talking to one another, even to outlaws who are willing to engage us in dialogue.<sup>176</sup>

### III. THE ROLE OF NEUTRALITY AND CONVERSATIONAL CONSTRAINT IN ACKERMAN'S POLITICAL LIBERALISM

Like Rawls, Bruce Ackerman is committed to a form of both domestic and international liberalism.<sup>177</sup> Some troubling features of liberalism emerge from Ackerman's recent discussion of political liberalism.<sup>178</sup> In fairness, Ackerman's concern here is with Rawls' most recent statement of political liberalism, not with comprehensively redeploying his own. Nevertheless, his candid approach to this subject reveals serious problems with political liberalism.

For Ackerman the central question political liberalism addresses is: "How are we to build a viable sense of political community amidst all this bewildering, and profound diversity?"<sup>179</sup> Ackerman's response is that such a community is possible by creating a neutral, free-standing conception of the state that seeks consensus through public reason and conversational constraint. It will be useful to examine the following features of Ackerman's response: (1) the neutrality of the good;

176. See Brower, *supra* note 150, at 23-26 (presenting a model conception of cooperation based on rational dialogue).

177. See generally BRUCE ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* (1980) [hereinafter ACKERMAN, *SOCIAL JUSTICE*]; ACKERMAN, *THE FUTURE OF LIBERAL REVOLUTION*, *supra* note 13.

178. Bruce Ackerman, *Political Liberalisms*, 91 J. PHIL. 364 (1994) [hereinafter Ackerman, *Political Liberalisms*].

179. *Id.* at 365. According to Ackerman, "[l]iberal community is . . . grounded on the simple desire to communicate." Bruce Ackerman, *What is Neutral About Neutrality?*, 93 ETHICS 372, 375 (1983). Ackerman's goal is to find a way for people to talk to one another without lying about the fact of ultimate disagreement: "Neutral dialogue . . . marks the boundary of the most extensive form of dialogic community . . ." *Id.*

(2) consensus in justification; (3) liberalism as a free-standing doctrine; (4) public reason; and (5) conversational constraint.<sup>180</sup>

### A. *The Neutrality of the Good*

Ackerman's reason for embracing the principle of the neutrality of the good is that when "we embed political commitments in any single comprehensive philosophy of life . . . we alienate other members of the community who have affirmed competing ideals."<sup>181</sup> In order not to skew the public square, the political principles governing its discourse must not depend upon any single comprehensive metaphysical, epistemological or moral ideal. Of course, those who believe that theirs is the one true comprehensive view will be unable to accept Ackerman's contention. Since some absolutists and some authoritarians are confident of their comprehensive views, for them liberal neutrality is preposterous. According to this position, it would be irrational for them to accept liberal neutrality as well as unreasonable for liberals to expect them to. In short, as Nagel observes, "if someone is willing to commit his own life to a particular conception, and convinced that the alternative is catastrophic, then it may be hard to resist imposing his opinion on others who, understandably but erroneously, fail to accept it."<sup>182</sup>

Ackerman must concede that he can have nothing further to say to such people. In their world, Ackermanian liberalism is at best unintelligible, and at worst a positive evil. This is not just a descriptive claim about dissensus and incommensurability. Rather, it is a skeptical normative claim that at this level of debate both Ackerman and the outlaw are preaching to the converted.

Consider two individuals: one individual grew up in a liberal society, the other in an outlaw society. Neither one is fully supportive of her regime. The skeptical claim maintains that given open-minded individuals of this sort, liberal arguments will fail to convince the open-minded outlaw, and outlaw arguments will fail to convince the open-minded liberal. (Of course, it is also possible that liberal arguments and outlaw arguments will fail to convince "open-minded" members of their own society.) The reason for this is that there is no further

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180. *Id.* at 365-68. I shall not discuss a sixth feature of this response: the importance of the concept of the basic structure of society, since it is not directly relevant to this Article's concerns.

181. Ackerman, *Political Liberalisms*, *supra* note 178, at 365.

182. NAGEL, *supra* note 137, at 168. Such a tendency, according to Nagel, "may be reinforced by the inclination to find them irrational, and thus subject to paternalistic coercion even under the liberal standard." *Id.* Absolutist forms of paternalism, therefore, come in liberal as well as nonliberal guises.

sphere of reason or perspective from which Ackerman or the outlaw could rationally tip the scales in one or the other's favor. This is not to say that there are no considerations that conceivably can tip the scales, just that nothing like traditional (universal) reason can.<sup>183</sup>

Ackerman and other political liberals do not appreciate fully the fact that embracing a liberal regime presupposes exposure to a political culture that values fairness, responsibility, cooperation, community, due process, and reasonableness.<sup>184</sup> When these features are absent it is difficult, though perhaps not impossible, to understand how liberalism can develop. Liberals embrace these virtues, while outlaws may not, or if they do, they need not give them the same content, or interpret them in the same ways as liberals do.

Many Westerners are committed to non-absolutism concerning their substantive values or comprehensive views.<sup>185</sup> For many liberals, non-absolutism affects every level of argument and justification. However, Ackerman has failed to provide a noncircular argument against absolutism. Ackerman might argue that this circularity merely reflects the non-absolutist dimension of human nature. Since most of us are non-absolutists, political liberalism arises once suitable conditions of non-absolutism are assumed. The claim that non-absolutism is a fact of human nature, however, is contestable. But even if non-absolutism is a fact of human nature, in some philosophical sense, it does not follow that sticking to your guns, in certain circumstances, and rejecting your opponents view is totally inappropriate. Isn't that what Ackerman would do against fascists or Ayotollahs? And after all, the non-absolutist dimension of human nature is an insufficient foundation for political theory. Non-absolutism is not wide enough nor is it deep enough to pick out and endorse specific liberal features of political organization. One person's non-absolutism is another person's skepticism.<sup>186</sup>

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183. See MACINTYRE, *supra* note 124, at 339 (claiming that the procedures of the public realm of liberal individualism and the psychology of the liberal individual each require the other, and that in coming together they define a new social and cultural artifact, "the individual").

184. This does not imply that the political culture of the United States actually exhibits these liberal virtues.

185. Yet, consider Byron De La Beckwith, the convicted murderer of Medgar Evers. This despicable outlaw is unperturbed about uttering the most outrageous racism concerning the absolute importance of maintaining racial purity, the absolute inferiority of Africans, and so forth. *SOUTHERN JUSTICE* (HBO Original Movie 1993).

186. The truth of a political proposition can be demonstrated in at least three kinds of circumstances: (1) circumstances most favorable to its acceptance, (2) circumstances least favorable, and (3) circumstances which are neither favorable nor unfavorable. A description of such circumstances includes *inter alia* the society's resources, the background culture, the motivational structure of its citizens, and so forth. For our purposes, suffice to say that grounding liberalism in

Political liberalism is problematic even when grounded in non-absolutism. Consider the case of religion: One type of religious conflict arises when members of a particular religion seek to express themselves as members of their religion in the public square. For these individuals, their religion and their allegiance to the political system are fundamentally important. Disallowing religious expression in the public square burdens these individuals. How can it be fair to insist that they are disallowed from expressing their religion (in a non-coercive manner) in the public? Excluding them from the public square bifurcates one central part of their life.

For example, is it so outrageous to devote a minute of public school time to a non-denominational prayer or silent meditation? Members of certain religions view the denial of such a request as a burden on the free exercise of their religion as well as their freedom of expression. Members of other religions, agnostics, and atheists regard the insistence of such public expression as a desire to proselytize, and therefore, as a burden to their free exercise of their conscience. But doesn't the insistence that a *wall* of separation exist between church and state fly in the face of a pragmatic accommodation of conflicting interests? Or does the history of religious persecution and intolerance show pragmatically that nothing less than a wall will protect freedom of conscience no matter how that might offend in a particular case?<sup>187</sup>

Arguably, given our history of tolerance and competition, permitting religious expression in the public square represents an imperceptible risk of establishing a religion. Doing so, of course, risks alienating minority religions, agnostics and atheists. But with the proper checks on establishing a single religion, such alienation can be avoided. It would be foolhardy to dismiss the oppressive, historical roots of Western religions. But that was then and this is now. We must not forget that alienation results from excluding religion from the public square as well as from permitting the public square to resonate with majority religions only. For example, religion, customs, and language are threatened by a society that has an expansive conception of the public square, yet forbids formal expression of these elements

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non-absolutism is like grounding capitalism in rational egoism, or socialism in egalitarianism, circumstances most favorable to its demonstration. In either case, the grounding does not compel capitalism or socialism, but accepting the ground makes it easier for someone to accept the conclusion.

187. I do not favor formal prayer in school. But I am uncertain that such a view can be defended on *liberal* grounds.

of the good. The insult to the individual whose religion, customs, and language are forbidden can be monumental.<sup>188</sup>

The liberal might reply that there is a question of alienation and fairness. If the established religion is embedded not only in rhetoric but also in political decisions, then it will seriously alienate the agnostic and the atheist. That is, if theism is seriously embedded in policy decisions, such concerns as the environment might suffer. James Watt, President Reagan's Secretary of the Interior and a born-again Christian, was accused of not aggressively protecting the environment because he believed that the Second Coming was imminent. In such circumstances, public policy will be decided indirectly on religious grounds.

But certainly the same kinds of arguments can arise within a theistic framework concerning the virtues of environmental protection. In other words, many other Christians will argue that saving the environment is just as important as non-theistic environmentalists contend. In today's world many decisions are made by people committed to comprehensive perspectives, yet they make their decisions on pragmatic grounds. The point here is that liberalism claims neutrality and impartiality in the religious sphere by not permitting the public square to embrace particular religions. But why does that result necessarily follow from political liberalism? It does so only if certain conditions exist—of religious intolerance and persecution—that *may* no longer exist in American society.<sup>189</sup>

Consider the case of language and culture. Language is a critical cultural feature of the framework within which one matures and ultimately develops one's identity. One's language, in part, determines the way one views the world, the possibility for growth and development, and the tone and tenor of one's experience. An individual is who she is, in part, because of her genetic endowment and because of the language and the cultural paradigms the language contains. The reason a person's language (and her culture) are so central to her development as a person is because human beings and their societies are linguistic in nature. We experience the world in terms of our language, and we learn this language dialogically. As Charles Taylor stresses "[w]e become full human agents, capable of understanding

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188. One could argue that religion is not excluded from the *public* square. Rather, it is excluded from contexts of *governmental* sanction.

189. In other words, we are no longer in fear of an established religion. Moreover, atheists, agnostics and heretics are no longer burned at the stake. Can't we now accommodate theists who feel the need to express their religious devotion in public contexts? But does that not mean that we can also accommodate the needs of theists who wish government to acknowledge and advance religious values?



ourselves, and hence of defining our identity, through our acquisition of rich human languages of expression."<sup>190</sup> Since the individual defines who she is, what is important to her, her attitudes toward other people, and the meaning of her existence, in part, in terms of her language, denying a person the opportunity to use her native language in public institutions means the suppression of that language and the stultification of the person.<sup>191</sup>

In short, alienation comes in many forms. One form of alienation arises when one comprehensive view is the official one.<sup>192</sup> Another form of alienation occurs when one is not permitted to express one's religion, language, or customs in the public square. The type of insult involved can be devastating.<sup>193</sup> If liberalism is to accommodate multicultural concerns it must first learn how to conceptualize the issue of the role of culture in American life.<sup>194</sup>

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190. CHARLES TAYLOR, *The Politics of Recognition*, in MULTICULTURALISM AND "THE POLITICS OF RECOGNITION" 25, 32 (1992).

191. *But see* George Sher, *Three Grades of Social Involvement*, 18 PHIL. & PUB. AFF. 133, 142 (1989).

This is often taken as a tenet of communitarianism, specifically, the ontological or conceptual priority of the social group. Communitarianism points to the contextual nature of human norms and principles, and rejects the purportedly liberal notion that autonomy is the primary value. *See* COMMUNITARIANISM AND INDIVIDUALISM (Shlomo Avineri and Avner de-Shalit eds., 1992) (containing a collection of important papers on liberalism and communitarianism).

192. We can learn about the problems associated with establishing one comprehensive view from the Canadian experience with establishing language. Constitutionally Canada is bilingual, French and English are the only formally sanctioned languages. During the past decade, Quebec passed legislation requiring all commercial signs to be written in French exclusively. Can this be justified in a liberal constitutional democracy? Similarly, can special constitutional protection of Native Canadian land, protections not accorded other Canadians, be justified by liberal theory? Recognizing Native Canadian culture raises different problems. Since the location of Native Canadians is typically removed from the rest of Canadian society, the problem of coercing (dominant) minorities does not arise. Moreover, since the lives of Native Canadians usually include poverty and political powerlessness, not providing them with special constitutional protection poses a greater threat to the survival of their cultures than it would in Quebec. But it is difficult to see how the exclusivity doctrine can be justified on these grounds. Requiring the French language, while permitting other languages in addition to French, strikes the appropriate balance between the competing cultural interests of French and English Quebecers.

193. Consequently, suppressing a person's language means suppressing the self. Taylor remarks that this lack of recognition is "not just a lack of due respect. It can inflict a grievous wound, saddling its victims with a crippling self-hatred. Due recognition is not just a courtesy we owe people. It is a vital human need." TAYLOR, *supra* note 190, at 26.

194. A word on the meaning of 'culture.' A culture is a systematic response to questions of social meaning in politics, science, ethics, art and ordinary life, though any given culture need not self-consciously identify the issues in these terms. More generally, "[a] culture is a human community . . . that is associated with on going ways of seeing, doing, and thinking about things." Amy Gutmann, *The Challenge of Multiculturalism in Political Ethics*, 22 PHIL. & PUB. AFF. 171 (1993) [hereinafter Gutmann, *Multiculturalism*].

Cultures contain paradigms or models—sets of instructions—for dealing with problems of living, acting and judging. These paradigms define the culture and provide standards for resolv-

The jurisprudence of the First Amendment's religion clauses promises an analytic framework for conceptualizing multicultural constitutional claims. In evaluating such claims, liberal democracies must balance two competing values. The first value concerns the "free exercise" of cultural interests, while the second concerns the "nonestablishment" of an official culture. In the religious context, integrating these values fairly and coherently have presented problems in American constitutional law. The most obvious reason for controversy is that the two religion clauses of the First Amendment, the free exercise clause and the establishment clause, invite conflict. How can we prohibit the non-establishment of religion when this risks burdening the free exercise of religion?

American culture and law have already decided some difficult cultural controversies, for example, the case of polygamy. One American religion, Mormonism, altered its fundamental principles partly as a result of the hostility toward the practice of polygamy. Today, in the Southwest, thousands of religious people still practice polygamy as part of their religion.<sup>195</sup> One can understand, perhaps, why Judaism, Catholicism and Protestantism forbid polygamy. Can it seriously be argued today, however, that a liberal polity need not tolerate polygamy as a fundamental part of some people's conception of the good? Can it seriously be argued that polygamy is "in violation of social duties or subversive of good order?"<sup>196</sup> Whose social duties? Which good order?

For liberalism, gender equality places constraints on polygamy, that is, society must permit both polygyny and polyandry. But what possible argument in terms of autonomy, rationality and equality *requires* monogamy exclusively? To be sure a polygamous society might differ from or be more complex than ours, but for liberalism, neither reason is conclusive. Liberalism should foster ingenuity and experimentation in accommodating as many conceptions of the good as possible. This is untrue in American society, where marriage rights are skewed in a nonliberal fashion.<sup>197</sup>

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ing social conflicts. For example, a cultural paradigm can be as specific, detailed and closed as the paradigm for marriage in many cultures, or it can be as vague, indeterminate and open-ended as the paradigm for courage. Each can be a cultural paradigm if invoked by a human community when attempting to give social meaning to human relations or personal attributes.

195. *Frontline* (PBS Television Broadcast).

196. *Reynolds v. United States*, 98 U.S. 145, 164 (1879).

197. See Will Kymlicka, *Rethinking the Family*, 20 PHIL. & PUB. AFF. 77, 92 n.17 (1991) (arguing that it is difficult to see how any plausible version of the parental trust principle can allow virtually unrestricted reproductive rights and parental autonomy for heterosexual couples yet restrict such rights and autonomy for everyone else).

If the constitutionality of cultural issues follows the constitutional framework of religion, liberal constitutional theory will prohibit the state from choosing to endorse one culture over others.<sup>198</sup> Instead, political decisions should treat each culture equally. Liberal theory cannot justify the formal recognition of a particular culture(s) as the official, established culture throughout the nation if doing so prohibits others from freely exercising their interests in alternative cultures.<sup>199</sup> It cannot even recognize *several* different cultures as the officially recognized culture. Instead, the liberal imperative is to treat cultures neutrally and impartially.<sup>200</sup> Similarly, liberal constitutional theory should provide conditions in which individuals are permitted to freely exercise their cultural rights. At times a concern over the free exercise of cultural rights may require giving special constitutional protection to weak or vulnerable cultures. One can view this as compensation to the minority cultures for continually taking a back seat in the formal and informal expressions of the dominant culture.<sup>201</sup> Alternatively, sometimes overprotecting free exercise rights will risk establishing an official culture.<sup>202</sup>

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198. But isn't it inevitable for the state to prefer some cultural paradigms over others? One response to this question contends that the neutrality involved here is only justificatory neutrality not consequentialist neutrality. The state may not use a particular conception of cultural identity in *justifying* the principles of cultural organization and stability. Of course, such principles might have *consequences* that favor some cultures over others. Although, this distinction seems relatively plausible, I am skeptical of its use in this context. Should not the participants of the original position *know* the likely consequences of the principles they choose for the basic structure of society? If certain choices made in the original position have the "unintended" consequences of deleteriously affecting Native American's culture, should these consequences or the knowledge of these consequences be considered as part of the justification of the principles themselves. Presumably, the distinction between justification and consequences consists of this: In the former context one appeals to abstract principles for justifying the basic structure of the society, without appealing to any one culture or set of cultures as part of that justification. Abstract principles then have consequences, but the consequences are conceptually distinct from the principles. But if it is clear that the application of the abstract principle in a particular situation harms Native American culture, and it is foreseeable that future applications will continue to harm that culture, then the "concretized" understanding of the abstract principle should include reference to this harm. The distinction between justification and consequences then becomes less plausible.

199. Some might argue that this is an impossible task, and that inevitably some cultural paradigm(s) will be officially preferred.

200. If liberalism presupposes a particular political culture, it will be unable to do this.

201. One can object that distinguishing between dominant (majority) and nondominant (minority) cultures oversimplifies the issues. In this view, the "dominant" culture consists of several cultures and the "dominant" culture is never static; instead it changes adding some cultures and subtracting others. I think this objection is correct. Nevertheless, I believe it is a useful distinction since within any given period of time some cultures have a greater influence on power relations than others.

202. It could be argued that American (progressive) culture is designed to establish one official culture over others, the public culture of free and equal individuals and independent cul-

Striking parallels exist between the constitutional dimensions of religion and culture.<sup>203</sup> For example, both the question of school prayer and the question of using French exclusively in commercial speech, to borrow an example from the Canadian experience, depend on steering clear of violating the free exercise and establishment "clauses," in one case of religion, in the other case of culture.<sup>204</sup> Similarly, government subsidies may contribute to the establishment of religion as well as the establishment of culture. Further, both religion and culture can play a central role in an individual's personality. In general, the questions of authoritarianism, tolerance and ecumenicalism are questions that equally apply to religions and cultures.

These similarities as well as others deserve further inquiry. We can now, at least, state the problem in uniform terms. In providing special constitutional protection to a minority culture, you risk *establishing* that culture which in turn might deny other minority cultures the possibility of *freely exercising* its cultural rights. In *establishing* a minority culture, you also risk fixing merely the present character of that culture and thwarting natural change. Moreover, in *establishing* a minority culture you take a stand against dissent within that culture. In disallowing special protection of that culture you risk denying its members the opportunity of *freely exercising* their cultural rights, thereby establishing the dominant culture.

Some theoretical framework is needed for explaining the relationship between establishing a culture and permitting the free exercise of a person's cultural rights. Establishing a culture is seldom justified by its coercive affect on the free exercise of cultural interests. However, in the case of Canada's indigenous peoples, I think the shoe is on the other foot. The risk of establishing an indigenous culture is slim in the first place. Therefore, restricting the majority culture's control of native lands, for instance, in order to help ensure the survival of the culture of the indigenous people, does not burden the majority in freely exercising cultural rights, while it greatly enhances the indige-

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tures. Ideally, such a culture, understood properly, has several attractive features. In fact, however, in a zero sum society, often such a culture is merely a guise for cultural domination.

203. Important differences also exist between cultural interests and religious interests, most notably, which is more central to individual freedom generally. The problem of defining "culture" is an obstacle to formulating a coherent conception of multicultural constitutionalism. For a general definition, see Gutmann, *Multiculturalism*, *supra* note 194.

204. According to the Canadian Supreme Court, legislation that limits the rights of the Anglophone minority in Quebec is constitutional. *Ford v. Quebec* [1988] 2 SCR 712, at 778, *quoted in* P. MONAHAN, *MEECH LAKE: THE INSIDE STORY* 180 (1991). In particular, the Canadian Supreme Court held that Quebec was warranted in adopting measures to assure the "predominance of the French language" in Quebec. *Id.* The legislation in question here has since been repealed.

nous people's opportunity to freely exercise their cultural rights. With little or no possibility of *establishing* a native culture, and a very great chance of improving the indigenous people's opportunity to exercise their cultural rights, this analytic device helps us decide this issue with relative ease.<sup>205</sup>

The analytic framework for evaluating the problem of multicultural constitutionalism consists of balancing the value of freely exercising one's cultural freedoms with the value of nonestablishing cultural norms. This must not be taken as a solution to questions of multicultural constitutionalism. Instead, it provides a relatively familiar framework for conceptualizing the problem of multiculturalism. In some instances, the framework will help provide easy cases. For example, because of the coercive affect on free exercise rights, establishing a culture is seldom justified. Accordingly we can adopt a presumptive rule against legislation that establishes one cultural paradigm over others. However, we must keep in mind that this is a presumptive rule, not a *per se* rule. We must allow for exceptions.

Ackerman, and other political liberals, fail to recognize that the *neutrality* of political liberals has a profound effect on multiculturalism. Neutrality creates an "artificial" culture, one reflecting the tenets of political liberalism. This "civic" culture is one that has no natural language, no traditional religion, and few customs and rituals. Nevertheless, it is a culture in the sense that political liberals tend to interpret many, if not all, of social life in terms of the liberal perspective. This should not be surprising. In this sense, liberalism is far from neutral; it is not neutral because it incorporates a personal lifestyle to go along with its political conception, although not every political liberal must adopt this style. Also, liberalism fails to be neutral because it embraces a particular view of the self. In fact, the liberal conception of the self is one "that moves from sphere to sphere, compartmentalizing its attitudes."<sup>206</sup> Liberals tend to value autonomy and to be reflective, sometimes excessively, not only about politics but also about their personal lives. Thus, liberalism is not only a political perspective but also can be said to embrace a comprehensive moral and prudential perspective; in short, liberalism tends to become a super-culture critically examining all, and rejecting some, traditional cultures.<sup>207</sup>

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205. Will Kymlicka argues for a liberal conception of cultural constitutional rights. His argument attempts to show why in some cases choice requires special constitutional protection of cultural rights. WILL KYMLICKA, *LIBERALISM, COMMUNITY AND CULTURE* 182-205 (1989); WILL KYMLICKA *MULTICULTURAL CITIZENSHIP* (1995).

206. MACINTYRE, *supra* note 137, at 337.

207. Nagel argues that liberalism may have an incidental effect on comprehensive views to the effect of indirectly favoring one or more comprehensive views over others. Consequently, such a

*B. Consensus in Justification and Liberalism as  
A Free-Standing Doctrine*

Ackerman's second and third elements can be discussed jointly. Ackerman contends that political liberalism entails a free-standing conception of consensus in justification. Political liberalism "seeks to explain to holders of different comprehensive views why it makes sense for each to adopt liberal principles."<sup>208</sup> Ackerman suggests that both anti-Kantians and neo-Kantians as well as Catholics may have reasons to accept liberalism, and that if this is so "why alienate potential supporters unnecessarily?"<sup>209</sup> Ackerman's admonition is to construct principles of politics that offend few, if any, and that captures an interest everyone has. The common interest might be liberty, equality, the dignity of the individual, or some strategy for settling conflicts short of violence.<sup>210</sup>

Ackerman does not acknowledge that asking everyone to exclude her conception of the good from the political arena does not fall equally on everyone. Some individuals, possessing only a thin conception of the good, sacrifice much less than those individuals possessing a thick conception of the good. In addition, regardless of the thickness of a conception of the good, some citizens have a conception of the good that is much more conducive to political liberalism than

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view may not be neutral in effect but is nevertheless impartial. NAGEL, *EQUALITY AND PARTIALITY*, *supra* note 137, at 166. However, the knowledge of such an effect gives a society a choice, to remain with policies that are more favorable to political liberalism, or attempt to set the balance straight by self-consciously considering alternative policies that favor other comprehensive doctrines. Of course, at some point the attempt to be fair to *every* comprehensive view may be too costly. It is not obvious, however, that Western democracies have already reached that point.

208. Ackerman, *Political Liberalisms*, *supra* note 178, at 365.

209. *Id.*

210. This common interest might itself be the beginnings of a new and independent comprehensive doctrine. Indeed, the overlapping consensus might signify this common element forming an independent comprehensive doctrine. Rawls would deny this, however. He would insist that the overlapping consensus arises when individuals find *different* reasons in their comprehensive doctrines for embracing the same political conception of justice. Thus, no *common* ground exists which could qualify as a comprehensive doctrine. See Ackerman, *Political Liberalisms*, *supra* note 178, at 364-68 (discussing Rawls' search for "common ground"). But how do we discern whether these reasons are different or the same? Where the political conception of justice is stable, what begins as different reasons might develop into a new comprehensive doctrine. Political liberalism is then not a neutral view that comprehensive views can endorse independently of modifying their conception of the good, but rather a very powerful substantive view that condemns many actual governments in the world today and throughout history. What's neutral about that? Political liberalism, understood as a free-standing view, therefore, can be interpreted as a competitor to comprehensive views, not as a supporter. If this argument can be sustained, liberalism's promise of neutrality, independence, and public justification is deeply duplicitous.

other conceptions. Political liberalism, a purportedly egalitarian notion, fails to distribute equally the benefits and burdens of adopting it.

### C. *Public Reason and Conversational Constraint*

Political liberalism's fourth and fifth elements are public reason and conversational constraint. These factors represent the hallmark of liberal political theory. If we can describe a form of reason that is conceptually tied to the common good, we can use this form of reason to settle social and political conflicts fairly without depending upon any one comprehensive view for the solution.

Liberal citizens should be prepared to form their opinions on the basis of a public dialogue that takes the views of others seriously, and that sets aside positions which cannot be defended except in terms of the individual's comprehensive conception of the good.<sup>211</sup> In Ackerman's view,

before a liberal citizen offers up a reason in public dialogue, it is not enough for her to find it persuasive. She must also convince herself that other citizens can find it reasonable despite the fact that they will keep on disagreeing about the ultimate meaning of life. Otherwise, she must accept the necessity of conversational constraint, and refrain from imposing her controversial notions of reasonableness on fellow citizens.<sup>212</sup>

It is difficult to see how such an approach can be practicable. Should conservatives not express their convictions about school prayer, gay and lesbian rights, and anti-political correctness because they cannot convince themselves that others will find their solutions reasonable? Similarly, must liberals abandon affirmative action, multiculturalism, or gay and lesbian rights because conservatives find these liberal views unreasonable? On this view, almost everyone in controversial cases is regularly "imposing [their] controversial notions of reasonableness on fellow citizens."<sup>213</sup>

Presumably, this conception of public reason and conversational constraint disallows conservatives, for instance, from appealing to religion to justify their views on gays in the military. So far so good. But it does not appear to disallow appealing to what they consider natural, or what is good for morale in the military. These notions equally derive from more general commitments about human psychology and what we can expect people to tolerate. In short, these reasons derive

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211. Cf. CHARLES E. LARMORE, *PATTERNS OF MORAL COMPLEXITY* 51 (1988) (stating that liberal "justification must be one that forgoes any appeal to the ideals whose controversial character sets the problem . . .").

212. Ackerman, *Political Liberalisms*, *supra* note 178, at 367.

213. *Id.*

from a more comprehensive view about the meaning of life. Similarly, the liberal's view derives from a general egalitarian predilection toward social structure, one that also rests on a comprehensive view.<sup>214</sup>

The general problem with these elements of political liberalism is that the liberal fails to recognize that disallowing one's comprehensive views in political discussion, even about the basic structure of society, is a profound insult to the integrity of the person.<sup>215</sup> Further, faith in public reason and conversational constraint seems to rest on the unsupported assertion that once we isolate our controversies, "it remains for the liberal citizenry to fashion affirmative arguments out of the available public arguments sufficiently incisive to resolve the citizen's ongoing disputes."<sup>216</sup> The history of the American polity suggests that no such public arguments exist. Recall that the most important test of such an issue, slavery, was resolved only by war.<sup>217</sup> So the efficacy of public reason and conversational constraint is questionable.<sup>218</sup> Simply put, the liberal (republican) goal of fashioning a form of civic discourse that is rich enough to settle political controversies, but thin enough not to do so by incorporating anyone's comprehensive conception of the good, has never been demonstrated with sufficient detail and clarity. Nor is it likely that it can.

Ackerman's conception of public reason and conversational constraint contrasts with Rawls since in the original position a Rawlsian contractor must be ignorant of her comprehensive conception of the good. Ackerman denies the need for individuals to regard themselves as unencumbered selves, "stripped of all social identity."<sup>219</sup> Indeed, for Ackerman, public dialogue begins in a very different spirit—

with the participants pledging themselves to construct a new dimension to their social identity. If they had not engaged in liberal dialogue, their identity would have been constituted solely by other social engagements—with their families, jobs, religious communities, and the like. Now, however, they are pledging themselves to

214. When the discussion shifts to a constitutional context, the liberal can argue that her view is based on constitutional equality. I am sympathetic to this view but it raises questions about the proper interpretation of the Equal Protection Clause which cannot be settled neutrally.

215. See Lipkin, *Kibitzers*, *supra* note 9, at 77 (arguing that when a devoutly religious person suppresses her desire to express the value of prayer in public institutions she may compromise her integrity); see also, Elizabeth H. Wolgast, *supra* note 103, at 1944 (finding it morally difficult and maybe even intolerable to limit the choice to speak only in the terms allowed by the ideal of public reason).

216. Bruce Ackerman, *Why Dialogue?*, 86 J. PHIL. 5, 19 (1989).

217. Ackerman is not unaware that dialogue may not achieve consensus. ACKERMAN, *SOCIAL JUSTICE*, *supra* note 177, at 275.

218. For further discussion of Ackerman's conception of dialogue see Lipkin, *Kibitzers*, *supra* note 9, at 74-82.

219. Ackerman, *Political Liberalisms*, *supra* note 178, at 369.



add yet another role to their social identity—they will, on the relevant occasions, deal with one another as citizens of the liberal state, interacting in the special ways regulated by their mutual commitment to the liberal conception of public reason.<sup>220</sup>

I think Ackerman's notion that liberal dialogue is a new dimension to an individual's social dimension—"another role to their social identity"—is insightful. Indeed, it intimates the liberal citizen's depth of commitment to the liberal state. Unfortunately, it also presents formidable problems for the liberal project: (1) the problem of the good, and (2) the problem of the unity of the self.

First, this social dimension in itself represents a partial conception of the good. Interacting with other liberal citizens involves being "regulated by their mutual commitment to the liberal conception of public reason."<sup>221</sup> The virtues of liberalism are central here in contrast to the virtues of the theist, the atheist, the Aristotelian, the utilitarian, and so forth. Second, it is precisely this new dimension of an individual's social identity that troubles many of liberalism's critics. With the advent of this additional role comes the possibility of conflict with other dimensions of their social identity as well as with their personal identity. In short, it implies that the liberal citizen cannot achieve or want to achieve a moral unity between the different aspects of herself. Liberals remain split between personal aspects, comprehensive perspectives and their social dimension. Moral unity between the various aspects of the liberal self cannot be achieved. The liberal may have to conclude that such unity is not really a good, but instead must be abandoned. The problem here is in determining just what justifies this conception. If moral unity, integrity, or coherence are goods, what makes them so? If embracing these virtues is intuitively plausible, any political conception must explain their value.

But Ackerman is no slave to intuitions.<sup>222</sup> Indeed, in his view, moral unity, integrity or coherence may be abandoned despite their intuitive plausibility. One will reject Ackerman's view here insofar as one endorses these virtues.<sup>223</sup> One will reject the intuition just insofar as one endorses liberalism. Liberals contend that it is reasonable to expect

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220. *Id.*

221. *Id.*

222. ACKERMAN, *SOCIAL JUSTICE*, *supra* note 177, at 349-55 (arguing against intuitionism in political theory). *But see* Steven Shiffrin, *Liberalism, Radicalism and Legal Scholarship*, 30 UCLA L. REV. 1103, 1201 (1983) (arguing for persistent intuitions over abstractions).

223. The reason for this is that "to be educated into the culture of a liberal social order is . . . characteristically to become the kind of person to whom it appears normal that a variety of goods should be pursued, each appropriate to its own sphere, with no overall good supplying any overall unity to life." MACINTYRE, *supra* note 124, at 337.

individuals to adopt this social role. But this notion of reasonableness has never been adequately defended or explained to the unconverted.

According to Ackerman's brand of political liberalism, public reason "does not require its participants to place their particular identities behind any veil, thick or thin. They are asked to enrich their social identities, not to impoverish them."<sup>224</sup> But by what standard do we judge whether the identities of the participants are enriched or impoverished? How does the theist enrich her social identity by becoming a political liberal? It seems that Ackerman must rely on public reason to answer this question. But it is difficult to see how public reason can be successful without begging the question. The natural response is that the participants are enriched or impoverished according to some conception of the good, or some conception of the liberal self. But if that is our answer, then Ackerman has not explained how it is possible to claim that the liberal self enhances one's identity without interpreting the conception of the self according to a liberal conception of the good.

Ackerman argues against communitarianism that liberalism's "overriding aim is not to glorify the unfettered individual, but to construct a concrete form of identity that all community members can affirm in good conscience."<sup>225</sup> In order to achieve this, "we must design the role of liberal citizenship with great care, making it a loose-fitting garment that many can wear without grave discomfort as they enter the public forum."<sup>226</sup> It must follow that when individuals cannot affirm this concrete identity it must be because the identity is flawed or the individuals are not acting in good conscience. But what does "a flawed identity" mean and how do we know when it obtains? In short, what is the paradigm of liberal citizenship and how does it avoid denigrating the conscientious convictions of many individuals?

Ackerman overlooks the problem of conscience that arises here. Those who believe that there is an overriding conception of the good, incompatible with liberalism's conception of public reason, must be branded either mavericks or outlaws. Some mavericks like the Amish or Hasidic Jewry are benign. But there is no guarantee that mavericks will not turn into outlaws. The former Mormons, or descendants of former Mormons, in the West and Southwest who adhere to polygamy do so as a religious and moral imperative.<sup>227</sup> They cannot in good

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224. Ackerman, *Political Liberalisms*, *supra* note 178, at 374.

225. *Id.* at 386.

226. *Id.*

227. *Frontline* (PBS Television Broadcast).

conscience adopt the liberal form of identity.<sup>228</sup> To do so would be to compromise their conception of the good.<sup>229</sup>

In the international realm there certainly are mavericks, but more importantly there are outlaws who conscientiously deny the liberal call to public reason. For them "public" reason must reflect the tenets of their religion, as in Iran and other theocracies. These countries often reject a distinction between public and private spheres of life. Again, liberalism is correct to brand these countries outlaws only by assuming the liberal background conditions of nonabsolutism and co-operation. But these are precisely the sorts of traits rejected by the countries in question.

The term "outlaw" then is merely a term of disparagement with no *universal* moral or intellectual content. In saying this I am not praising outlaws. I am merely saying that liberals should be aware that their political imperatives stem from the sort of community whose members have certain traits that make liberalism plausible or even desirable. But liberalism may very well fall on deaf ears to individuals and communities not possessing these traits.<sup>230</sup> This does not entail abandoning the pursuit of liberal goals. It just means that we should not deceive ourselves into viewing liberalism as a general panacea that necessarily holds the moral high ground.

What holds the moral high ground are those judgments we endorse on fallibilist grounds during each age of political, social, and moral reflection. Sometimes this moral high ground will embrace a neat dichotomy between public and private reasons, sometimes it will not. Moreover, the moral high ground would seem to include restricting the expression of the dominant culture, while encouraging the expression of minority cultures.

Ackerman exuberantly exclaims that "political liberalism remains humanity's best hope in a world where cultural diversity is not only a

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228. Liberalism advocates revising one's life plans in light of new evidence, a goal religious fundamentalism cannot embrace. William Galston, *Pluralism and Social Unity*, 99 *Ethics* 711, 714 (1989) (wondering "whether . . . religious fundamentalists would regard the capacity to form and revise a conception of the good as a good at all, let alone a highest order interest of human beings").

229. One might argue that nothing inherent in liberalism prevents this. And that might be correct. But no form of liberalism in America has ever acknowledged the possibility of such a conception of the good being compatible with liberalism. Until such a time, this example serves the purpose of illustrating the problem of conscience.

230. I do not consider it to be a *liberal* response to say that this confuses *persuading* one's adversary of the truth or reasonableness of one's position with the truth or reasonableness of the position itself. Despite this important distinction, liberals cannot retreat behind such dichotomies and must remain sensitive to the views and needs of others which is, after all, the basis of liberal tolerance.

fact of life, but a joy of living.”<sup>231</sup> But from where does the *liberal's* individual cultural perspective derive? Moreover, for whom is it a joy of living? Liberalism embraces rationality and autonomy not only in the political domain, but also as a general attitude or strategy for living. In the latter case, liberals often parade critical reflective thought that distances them from their own goals. In this event, such a liberal must be excused of hypocrisy and condescension in delighting in all the quaint and benign cultural differences in the world.<sup>232</sup> Cultural differences with a bite are somehow not part of a joy of living. Nor should they be. But it is not clear that liberalism has any general explanation, let alone a non-circular justification of why they should not.

#### IV. THE SCOPE OF POLITICAL LIBERALISM

##### A. *Political Liberalism and the Political Culture of a Democratic Society*

The problem with political liberalism is that it aspires to but cannot achieve independence from social theory. Rawls contends that political liberalism is not a comprehensive doctrine, just a doctrine concerning the proper scope of politics in the public culture of a democratic society. There are two problems with such a view. The first problem concerns Rawls' description of how political liberalism is derived. The scope of political liberalism is tied to the history and generation of the American political democracy or at least to a democracy sufficiently similar to our political culture and tradition. In the context of the law of peoples this historicist cast must be dropped.<sup>233</sup> In its place a different process—relying on some epistemic or metaphysical doctrine—must emerge to generate the liberal conception of how democracies and well-ordered hierarchical societies should interact. If a well-ordered hierarchical society should embrace a liberal conception of the law of peoples it must do so because of some feature of the *reasoning* in the original position, not because of the shared traditions of a public culture of democracy.

The second problem arises in the context of the law of peoples and has been identified indirectly by Ackerman. If political liberalism is historicist, it would seem that liberals in outlaw societies, as well as in well-ordered hierarchical societies, would be unable to raise epistemi-

231. Ackerman, *Political Liberalisms*, *supra* note 178, at 386.

232. We can understand why the liberal might derive pleasure from cultural diversity. Liberalism is committed to the deliberative attitude, and the deliberative attitude seeks diversity upon which to deliberate.

233. An historicist account of justice ties the derivation of principles of justice to values inherent in the actual political culture of the society.

cally valid liberal arguments against their own regimes. These societies, let us assume, have no political culture of democracy. Lacking the political culture of democracy should preclude making liberal arguments that one can reasonably expect others to accept.<sup>234</sup> This conclusion concerning the impossibility of liberal arguments in nonliberal societies is counter-intuitive. Political liberalism is more than just a majority cultural perspective. In fact,

[t]he power of Rawls' work owes itself entirely to his creative re-shaping of abstract philosophical arguments inherited from the Western tradition . . . Neither Locke, nor Kant, not even Mill wrote at a time when liberalism was ascendant in the 'public political culture.' Instead, they wrote with the intention of *changing* their cultures in profound ways."<sup>235</sup>

But contemporary incipient liberal traditions need not fold their tents because liberalism does not depict their public political cultures. Ackerman is right in saying that "[t]he task is to criticize political culture, not to rationalize it; to change it for the better, and struggle against authoritarian regression."<sup>236</sup> Thus, "political liberalism is a revolutionary doctrine, based on a radical idea [of equal liberty]."<sup>237</sup> Consequently, the movement must be based on something beyond *political* liberalism. A more candidly epistemic conception of political liberalism is required at least insofar as the possibility of (minority) liberal argument in a nonliberal society.

The stages of political liberalism's evolution then is at least two fold: the first is epistemic and nonhistoricist, while the second is historicist. We should be careful to appreciate the import of this last point. *Political Liberalism* is designed to replace one aspect of *A Theory of Justice*, namely, the dependency of the principles of justice on epistemic justification, as opposed to historicist, contextualist meaning and justification. If the above argument is correct then Rawls' *The Law of Peoples* derails the argument in *Political Liberalism* because at least insofar as international law is concerned Rawls embraces an epistemic justification and not a pragmatic justification. In other words, there exists a sharp dichotomy between the deployment of the liberal conception of justice in the domestic case and in the international area.

The strongest argument against the plausibility of liberal multicultural constitutionalism in both the domestic and international contexts

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234. Unless, of course, these cultures exhibit certain features that permit the development of effective criticism. However, effective liberal criticism appears precluded because the required *liberal* features of the culture are absent.

235. Ackerman, *Political Liberalisms*, *supra* note 178, at 376-77.

236. *Id.* at 377.

237. *Id.*

arises in explicating the notion of reasonableness. If reasonableness entails a commitment to critically revising and correcting one's cultural scheme, an argument arises that suggests that certain nonliberal cultures are unable to critically revise in the appropriate sense, and therefore cannot be tolerated by liberal cultures.

### *B. Political Liberalism and Personal Ideals*

The issue of whether political liberalism is tied to conspicuously liberal *personal* ideals is central to understanding political liberalism and its claim to represent an overlapping consensus of liberal and non-liberal comprehensive doctrines. This issue is paramount because if political liberalism implies such ideals, it cannot then claim to be neutral with respect to other comprehensive moral or philosophical doctrines. If so, then political liberalism must have a negative effect on the law of peoples because it favors those nations whose citizens exhibit personal life styles that are compatible with liberalism. The question then is whether political liberalism is truly just *political* or whether in addition it encourages, prompts or requires a particular social theory entailing personal ideals.

Both Kantian (deontological) theory and Millian (utilitarian) theory appear to be committed to liberalism in one's personal life. Alternatively stated, both these moral theories appear to have a deep structure that reflects the deep structure of political liberalism: this deep structure is some combination of autonomy and rationality in making practical decisions, whether these practical decisions are moral, political, or personal practical decisions. The two virtues of autonomy and rationality are not merely devices for generating unanimity among rational contractors or for determining the basic structure of society. Instead, these virtues depict the highest ideals of moral personality in political theory and in one's personal affairs. In both contexts these virtues encourage a critical detachment from substantive values, a certain neutrality with respect to political and personal goods.

To put it another way, autonomy and rationality give rise to political and personal neutrality, or more to the point, political and personal deliberation. In the personal context, it means a self-critical consideration of one's goals, and an openness, though critical, response to the goals of others. For the liberal, "[i]mpartiality, reflectiveness, self-criticism, the articulation and defense of moral reasons, forms of diversity, broad sympathies, and decisiveness, conduce to liberal forms of public and private excellence. The liberal virtues are at once political

and personal, civic and private.”<sup>238</sup> In short, “[t]o a greater extent than liberals usually allow, freedom is a way of life.”<sup>239</sup> Liberals reject systems of thought and action based solely on tradition and contingency. The liberal way of life embraces autonomy and deliberation.<sup>240</sup> It is difficult if not impossible to imagine how liberalism can achieve this without affecting an individual’s comprehensive moral theory, including her theory of the good and her personal ideals.

Charles Larmore believes liberalism can achieve this. Indeed, he argues that political liberalism does not mean “that in our *personal* ideals, in our ideals of what we should be as persons outside the political realm, we must have a greater allegiance to neutrality than to our own conception of the good life.”<sup>241</sup> Larmore argues that the liberal neutrality requirement can be understood in at least two ways: (1) as a *modus vivendi* between and among different conceptions of the good; or (2) as an expression of the connection between the liberal’s political conception of the right and her personal conception of the good.<sup>242</sup>

As a *modus vivendi* liberal neutrality “is simply a means of accommodation. It is a stance that expresses our full understanding of our purposes. It establishes a *modus vivendi* between persons whose ultimate ideals do not coincide.”<sup>243</sup> Understood in this fashion, liberal neutrality “serves only as a political principle, governing relations among people as *citizens*. In the political realm neutrality must be supreme, and our substantial ideas of the good life, if controversial, must give way before it.”<sup>244</sup> Larmore argues for the *modus vivendi* approach despite the existence of good reasons for denying it a role in defending liberalism.

Noted liberals such as Rawls and Nagel do not think the *modus vivendi* approach to be a satisfactory account of the liberal conception of our relationship with nonliberal cultures. Rawls denigrates the possibility of political liberalism resting on “a mere *modus vivendi*, de-

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238. STEPHEN MACEDO, LIBERAL VIRTUES: CITIZENSHIP, VIRTUE AND COMMUNITY IN LIBERAL CONSTITUTIONALISM 276 (1990).

239. *Id.* at 265.

240. Some liberal virtues constituting the liberal way of life include law-abidingness, independence, work ethic, self-discipline, and responsibility. Cf. Will Kymlicka and Wayne Norman, *Return of the Citizen: A Survey of Recent Work in Citizenship Theory*, 104 ETHICS 352, 365 (1994) (surveying theories of citizenship and their recent resurgence in political thinking).

241. LARMORE, *supra* note 211, at 69.

242. *Id.*

243. *Id.* at 74.

244. *Id.* at 75.

pendent on a fortuitous conjunction of contingencies.”<sup>245</sup> The problem with a mere *modus vivendi* approach is that it does not provide the kind of stability and unity that Rawls seeks.<sup>246</sup> Nagel also argues against a *modus vivendi* approach on the ground that defending toleration as a *modus vivendi* “can be offered to holders of radically divergent moral and religious positions, but it is an instrumental argument, and does not represent higher-order impartiality in the political sphere as a value in itself.”<sup>247</sup> The problem here is that a *modus vivendi* “could not therefore be offered as a reason for toleration to those who felt certain that their domination of the society was completely secure.”<sup>248</sup>

Larmore’s next project is to denigrate the expressivist role of connecting political and personal ideals, interpreting it as a function of Kantian metaphysics. He characterizes this doctrine in Kantian terms:

[W]e could understand political neutrality as expressing the very sort of detachment we ought to have in general toward any substantial ideal of human flourishing. To the neutrality of the state would correspond the autonomy of the individual as our highest personal ideal, for the autonomous person sustains a certain distance toward his substantial ideal of the good. Because the substantial ideal is his only because he has freely made it his, it cannot be constitutive of his understanding of what is of paramount importance to him. His highest ideal remains his autonomy, not the substantial ideal he autonomously chooses.<sup>249</sup>

Larmore’s conception of Kantian political expressivism “demands that our highest political ideal be mirrored in our highest personal ideal, that is, in our ideal of what should have paramount importance in the rest of our lives.”<sup>250</sup> According to Larmore, “Kant believed . . . that the personal ideal of autonomy should form an indispensable part of political liberalism.”<sup>251</sup> Larmore argues against the Kantian metaphysics of practical reason which he believes grounds Kant’s position. However, he never considers the possibility that political expressivism is possible independently of metaphysics. Larmore does acknowledge that this expressivist view is not endorsed by Kantian liberalism alone.

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245. John Rawls, *The Idea of an Overlapping Consensus*, 7 OXFORD J. OF LEGAL STUD. 1 (1987).

246. RAWLS, POLITICAL LIBERALISM, *supra* note 16, at 147-48.

247. NAGEL, EQUALITY AND PARTIALITY, *supra* note 137, at 157.

248. *Id.*; see also THOMAS W. POGGE, REALIZING RAWLS 221 (1989) (concluding “that relations within a *modus vivendi* will be neither peaceful nor just”). This, however, depends on the nature of the *modus vivendi*, the need for the *modus vivendi*, the motivation of its participants, and social and economic conflicts generally.

249. LARMORE, *supra* note 211, at 76.

250. *Id.*

251. *Id.* at 83.



In fact, the German Romantics endorsed such a view but not in order to defend liberalism. According to Larmore, the romantics demanded "that a substantial notion of the good unite all areas of social life and that the individual overcome the 'alienating' distinction . . . between the roles of *homme* [man] and *citoyen* [citizen]."<sup>252</sup> This view overlooks, according to Larmore, that neutrality is a political or legal goal about how government is to treat its citizens in these areas, and not a comprehensive philosophy of life.

Larmore might be correct in insisting that neutrality and autonomy need not be expressed in the personal lives of liberals, although I think more needs to be said in defense of this thesis. But it is important to note that the good of autonomy is a goal of liberals who might have never studied Kant or Mill.<sup>253</sup> It represents the credo of certain cosmopolitan intellectual points of view concerning politics and personal life; it represents a certain commitment to critical deliberation: embrace only those values that you have decided for good reasons should be embraced. This credo represents a strategy for one's personal life just as Church teachings represents a strategy for a Catholic's personal life.

For the sake of argument, assume that there is no necessary relationship between critical deliberation in politics and one's strategy for deciding upon personal ideals. At least, it must be conceded that *some* political liberals contingently choose political liberalism because it reflects the ideals of critical deliberation in their personal lives. The following problem arises: Since some liberals *do* express these ideals in their personal lives and exhort others to do the same, they have an unfair advantage in liberal society.<sup>254</sup> *Political* liberals, who are not also comprehensive liberals, embrace neutrality and autonomy as virtues of the *political* or *legal* domain only, despite the fact that this necessitates suppressing their own nonliberal conception of the good. Other political liberals advance political liberalism because it conforms to their comprehensive conception of the good.<sup>255</sup> Or if they do

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252. *Id.* at 93.

253. As Larmore himself concedes, Mill embraced a form of this doctrine.

254. Liberalism is more than just a principle of social justice. It is also a commitment to a way of life, personal as well as political. Liberalism embodies a *rationalistic* or *deliberative* element in deciding on the distribution of burdens and benefits in society as well as in a single life. Ideally, it expects individuals to express this rationalistic or deliberative element in their personalities by choosing only values that can be defended by a deliberative process. See William Galston, *Defending Liberalism*, 76 AM. POL. SCI. REV. 621, 629 (1982) (arguing that "[l]iberalism contains within itself the resources it needs to declare and to defend a conception of the good life that is in no way truncated or contemptible").

255. In Larmore's view, liberalism represents "a theory of politics, not a theory of man." LARMORE, *supra* note 211, at 118. Some forms of political liberalism, however, also embrace a

not consciously advance political liberalism for that reason, they nevertheless derive an uncompensated benefit which will appear unfair to political liberal who are not also comprehensive liberals.

Political liberals having a liberal conception of the good are not then really engaged in liberalism as a *modus vivendi* or in liberalism as an overlapping consensus. Rather, these liberals are really enforcing their comprehensive conception of the good on others.<sup>256</sup> For example, if such a liberal rejects religion because it cannot be sustained by her liberal conception of the good, that is, it cannot be sustained by neutrality, critical reflection, or autonomy, then such a rejection is translated into the political arena. This benefits comprehensive liberals twice: first concerning political liberalism, and then concerning their liberal conception of the good. Meanwhile someone committed to political liberalism only is benefited, if at all, only once.

Political liberalism's tendency in some people's lives to become a comprehensive conception, not just political, promises to affect the question of liberalism's compatibility with nonliberal cultures and nonliberal regimes. Comprehensive liberalism has implications for questions of tolerance in the domestic as well as the international setting.<sup>257</sup> Liberalism contends that it tolerates alternative conceptions of the good. We see, however, that liberalism can only say that it tolerates *more* conceptions of the good than many alternative conceptions of justice. More importantly, perhaps, liberalism cannot tolerate conceptions of the good that it deems unreasonable. But unless a non-circular explanation of reasonableness is available, unreasonable doctrines must be understood merely as rejections of nonliberal values and the cultural conditions which ground such values. Consequently, the outlaw—someone who insists on the principled adherence to her conception of the truth—cannot turn to political liberalism for her defense. The political liberal's strength is her commitment that given the facts of contemporary political life we must find ways to live harmoniously with one another. But the political liberal never explains why

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theory of virtue, or how people should live their personal lives. See Galston, *Defending Liberalism*, *supra* note 254, at 628-29 (listing the elements in the liberal conception of the good, including social peace, rule of law, diversity, inclusiveness, decency, affluence, self-realization, approximate justice, truth, and privacy).

256. A deliberative culture is a comprehensive response to problems in living, a response that is not reducible to any actual historical culture. See *infra* notes 259-67 and accompanying text (discussing deliberative and dedicate cultures).

257. The history of toleration traces the development and the legitimacy of dissent and freedom in religious thought and practice. HENRY KAMEN, *THE RISE OF TOLERATION* (1967). In fact, Rawls' discussion of tolerance, though not conceptually restricted to religious contexts, takes the religious wars in the sixteenth century as a paradigm for questions of tolerance.

that truth is somehow more important than the truth of some religious or philosophical position.<sup>258</sup>

### C. *Deliberative and Dedicate Cultures*

The following framework can helpfully conceptualize the question of whether liberalism can tolerate diverse international and domestic cultures. Distinguish between two kinds of cultures: a deliberative culture and a dedicated culture.<sup>259</sup> A deliberative culture is committed to the deliberative attitude which is concerned with rational autonomy as the basic principle for deciding personal and cultural issues. This type of culture employs a deliberative process for settling social conflicts and for cultural change. Deliberative ideals, both on an individual and a cultural level, continually seek to modify, revise, and refine cultural values. By contrast, a dedicated culture embraces continuity and closure in the values it seeks. Dedicated cultures possess a cultural narrative providing a normative theme for grounding the culture. Typically this theme explains the origination of the culture and why the relevant cultures values are sanctioned. Dedicated cultures approach conflict resolution and cultural change through sanctified tradition and custom.<sup>260</sup> In a deliberative culture, individuals can appeal to a generalized and purportedly neutral notion of rea-

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258. If we are concerned with a liberty maximizing approach to free exercise and establishment clause issues we should be willing to accept the costs of satisfying these interests. For an instructive analysis and endorsement of this approach see Rodney K. Smith, *Establishment Clause Analysis: A Liberty Maximizing Proposal*, 4 NOTRE DAME J. L. ETHICS & PUB. POL'Y. 463 (1990) (examining the elements of religious liberty while challenging originalist views of the Establishment Clause and endorsing liberty maximizing theories).

259. I describe and defend the distinction between deliberative and dedicated cultures in much greater detail in an unpublished manuscript entitled Robert Justin Lipkin, *Liberalism and The Possibility of Multicultural Constitutionalism: The Distinction Between Deliberative and Dedicated Cultures*, 29 RICHMOND L. REV. 1263 (1995). Rodney K. Smith also applies this distinction to establishment issues in Native American cultures. See Rodney K. Smith, *Sovereignty and the Sacred: The Establishment Clause in Indian Country*, 56 MONT. L. REV. 295 (1995) (examining the role of the Establishment Clause in Native American territories). My distinction should be distinguished from William Galston's distinction between two kinds of liberalism: one committed to autonomy, the other committed to diversity. See William Galston, *Two Concepts of Liberalism*, 105 ETHICS 516, 523 (1995) ("[P]roperly understood, liberalism is about the protection of diversity, not the valorization of choice."). I disagree with Galston's characterization of liberalism, properly understood, as concerned with diversity. Without autonomy the commitment to diversity lacks a sufficiently deep explanation why diversity is normatively attractive.

260. Liberal writers infrequently recognize that liberalism is "one more contingently grounded and founded tradition, in conflict with other rival traditions as such and like certain other traditions in claiming a right to universal allegiance, but unable to escape from the condition of a tradition." MACINTYRE, *WHOSE JUSTICE? WHICH RATIONALITY?*, *supra* note 124, at 346.

son or dialogue<sup>261</sup> to conduct social inquiry and to resolve cultural conflicts.<sup>262</sup> Deliberative strategies take on a life of their own, or put differently, deliberative strategies often give rise to a deliberative *way of life*.<sup>263</sup>

Deliberative cultures are also committed to the belief that clear, decisive methods exist for deriving answers to social or cultural conflicts. Further, a deliberative culture holds that in principle at least all anthropological practices, such as kinship relations, marriage, education, and so forth must be validated by deliberative rationality in order for liberals to embrace them. A deliberative culture is one that embraces reason, in its modernist incarnation, as a neutral tool for settling political and social conflicts. Deliberative cultures are predicated upon the epistemic individualism of the Enlightenment and the expression of this individualism in the values of autonomy, equality and rationality.

The Enlightenment's conception of reason is a process through which we can stand above actual cultural practices and evaluate or validate them in a value-free manner. The moral authority of one's culture derives from this process of validation. When applied comprehensively, liberalism becomes a deliberative culture, one that rationally scrutinizes all social institutions and social practices as well as personal life plans. Liberal rationality becomes the ideology of the culture in which it is embraced. It defines cultural growth, refinement and stability. Liberal rationality, surprisingly, offers a process for evaluating personal decisions and judgments. Understood in this fashion, liberal rationality is a comprehensive way of life. Although liberalism embraces rationality in both the private and public spheres, some forms of liberalism nonetheless insist that the agent is typically the final authority for determining whether a personal decision is rational.<sup>264</sup>

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261. In fashioning a principle to deal with multiculturalism, Amy Gutmann distinguishes between "comprehensive universalism" and "deliberative universalism." See Gutmann, *Multiculturalism*, *supra* note 194, at 193. Comprehensive universalism includes a set of rational principles applicable to all cultures, while deliberative universalism emphasizes public dialogue or public reason to resolve cultural conflicts in particular societal contexts. In my view, comprehensive universalism is impossible. For one thing even comprehensive universalism must take into account context and circumstances.

262. On this view, "the principle of rationality that is above the partisan fray (and therefore can assure its 'fairness') is not incidental to liberal thought; it *is* liberal thought, and if it is 'softened' by denying reason its priority and rendering it just one among many legitimate paths, liberalism would have no content." Fish, *supra* note 151, at 137.

263. The distinction between deliberative and dedicated cultures does not track the distinction between majority and minority cultures. In any given nation, a deliberative culture might be either the majority or the minority culture.

264. Much more needs to be said about this Enlightenment conception of reason. For example, is this conception of reason merely one tradition among others? If so, it may then have no

In a dedicated culture, cultural paradigms, metaphors and rituals are typically created by incremental processes at the center of which is the importance of group identity and the perpetuation of that particular culture's basic, narrative theme. Dedicated cultures incorporate processes of conflict resolution defined by canonical texts and authorities. Although dedicated cultures usually claim universal validity, their conception of conflict resolution will be persuasive only if one already accepts the relevant canonical texts and authorities.

Typically, though not necessarily, a dedicated culture is one that develops slowly over time in multifarious personal, religious, political, social, economic and biological contexts. A myriad of different decisions create a dedicated culture. No one method exists for determining how a particular dedicated culture resolves a particular problem in living.<sup>265</sup>

The questions can then be posed in the following manner. Since liberalism clearly appears to be a deliberative concept can it tolerate dedicated cultures?<sup>266</sup> One possible approach to this question is to suggest that liberalism can embrace both kinds of cultures since it contains a very strong principle of toleration. On this view, liberalism can tolerate both types of cultures just so long as both deliberative cultures and dedicated cultures suppress their comprehensive conception of the good and seek principles of cooperation. Realistically, liberalism acknowledges that most people will never be able to achieve the *ideal* of rationality in their lives. Consequently, liberalism claims to tolerate diversity in private affairs. Hence, liberalism endorses the private-public dichotomy in political theory.

This brand of liberalism embraces privacy or personal autonomy not because it endorses diversity or pluralism. Instead, most versions of liberalism are predicated on the conviction that *ideally*, freedom and rationality will, for the most part, determine a single set of rational choices across persons, or if a plurality of rational choices is

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special claim to be the standard by which other traditions are evaluated. See MACINTYRE, *WHOSE JUSTICE? WHICH RATIONALITY?*, *supra* note 124.

265. The distinction between deliberative and dedicated cultures is not identical to the distinction between open and closed cultures. A culture is open when it permits and encourages changes and development through contact with other cultures. A closed culture does not. But an open culture can be a dedicated culture and a closed culture can be a deliberative one.

266. In this context, Stanley Fish's observation is on the money:

"Tolerance" may be what liberalism claims for itself in contradistinction to other, supposedly more authoritarian views; but liberalism is tolerant only *within* the space demarcated by the operations of reason; any one who steps outside that space will not be tolerated, will not be regarded as a fully enfranchised participant in the marketplace (of ideas) over which reason presides.

Fish, *supra* note 151, at 137.

generated, the choices are compatible and congenial choices.<sup>267</sup> However, circumstances are seldom ideal. Consequently, since liberalism cannot at this time be realized, the liberal *tolerates* diversity. But liberalism has no real commitment to diversity; nor does it have a real commitment to tolerance. This says something about both liberalism and tolerance.

The tolerance associated with liberalism is both inadequate and pernicious. It is inadequate because it expresses the wrong *moral attitude* toward diversity, which should be an attitude of respect and appreciation—a relish for difference—of how different individuals in different cultures resolve problems of living differently. It is pernicious because it tolerates social practices that it cannot respect even according to its own lights. For example, consider the mainstream liberal view rejecting the constitutional legitimacy of ordinances against hate speech. Liberal constitutionalism must permit hate speech, or so the argument goes, because it is the price one pays for freedom of speech. But liberalism must condemn hate speech because it is irrational, while simultaneously defending the rights of hate speakers. What this overlooks, even on liberal grounds, is the loss in terms of autonomy and self-realization to the victims of hate speech. In other words, equality of opportunity concerning human flourishing is lost by “tolerating” hate speech.

Liberalism holds that pluralism is better than the universal choice of any one *dedicated* cultural view. Liberalism appeals to freedom as a fundamental value, but in fact scoffs at freedom without rationality. Indeed, for genuine liberalism, freedom without rationality is not *autonomy* at all. According to liberalism, rationality precludes a spate of social and personal choices and, therefore, precludes accepting dedicated cultures unless they are deliberative cultures in disguise. Upon closer inspection this approach fails. Liberalism can tolerate alternative cultures just so long as these cultures embrace the liberal conceptions of reason or dialogue. This toleration will include some cultures, but not the really recalcitrant, forbidding cultures, that is, the outlaw cultures. And liberalism cannot tolerate these kinds of cultures since they renounce (Enlightenment) reason. But is there then a significant difference between liberalism as a deliberative culture and other non-liberal or dedicated cultures?

According to the formal liberal line, liberalism can tolerate dedicated cultures but only concerning the concept of the good. Liber-

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267. Some notable liberals reject this ideal. See, e.g., ISAIAH BERLIN, *THE CROOKED TIMBER OF HUMANITY* (1992).

alism as a deliberative construct can tolerate both deliberative and dedicated conceptions of the good, whereas if liberalism incorporated a dedicated construct it would be difficult to see how it could tolerate deliberative constructs or dedicated constructs incompatible with its precepts. The problem here is that liberalism cannot tolerate dedicated constructs in the political domain, the domain that many cultures believe should be governed by their own dedicated constructs. Liberalism compels dedicated cultures to withdraw from the political domain and content themselves with the nonpolitical.

Although once we see the connection between liberalism's conception of the good and democracy we might embrace liberalism, but let us do so with our eyes open. In choosing liberalism we are asking many cultures to cease and desist in an area of social life they may feel is very important. Imagine a liberal in Iran telling the majority devotees of Islam that laws requiring a certain kind of dress or certain kind of literature and so forth should be repealed because they cannot be defended by a deliberative culture, only by a dedicated one. The obvious reply here would be so much the worse for the deliberative culture. Or imagine a Latino in the United States being told he must conduct his business in English because that's what a deliberative argument would embrace.<sup>268</sup> His devotion to Spanish can only be defended on dedicated grounds and therefore can not prevail in a deliberative culture.<sup>269</sup> My point is *not* to insist that I reject these liberal conclusions. Rather, I am not convinced that in one can argue for these conclusions in a non-circular manner.<sup>270</sup> The tendency here is to appeal to reasonableness as a way of rejecting dedicated cultures. But as our earlier discussion has shown, liberalism has not provided a non-circular conception of reasonableness in political argument generally. It is no more likely to provide such an argument here.

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268. It is not obvious that a deliberative argument would reach this conclusion.

269. What's wrong with a bilingual or even trilingual society if it permits masses of people to retain dedicated features of their cultures? Perhaps, on pragmatic grounds, a multilingual society is a disaster. Or does such a judgment reveal that we are too quick to prefer convenience to respecting dedicated cultures? In fact, doesn't liberalism generate a blindness towards the importance of dedicated cultures?

270. Stanley Fish suggests that liberalism is just one ideology among many and any ideology "must be founded on some basic conception of what the world is like." Fish, *supra* note 151, at 137. Fish further elaborates that this conception of what the world is like "may admit of differences within its boundaries . . . it cannot legitimize differences that would blur its boundaries, for that would be to delegitimize itself." *Id.*

### D. Liberalism and Pragmatism

#### 1. Possibilities for the Future Basis of Liberalism

If liberalism cannot rely on a non-circular conception of reasonableness in political argument or in its rejection of dedicated cultures, what can it rely on? If we reject political liberalism, do we adopt such standard antiliberal ideologies as fascism or communism? Fortunately, few, if any, reflective people would embrace these options. But then we must face squarely what alternatives are open to us. In this section I want to sketch four possible options available in this contemporary era:<sup>271</sup> (1) Liberals might continue to search for non-circular formulations of liberal political argument; (2) A mixed theory of deliberative and dedicated concepts might be sought; (3) Skepticism concerning political theory and methodology cannot be ruled out in advance; and (4) Pragmatic political theory might represent an alternative to liberalism, to mixed political theory, and to skepticism in political argument.

If this Article's argument is correct, the first alternative is futile. However, I do not underestimate the hold liberalism has on American political thought. Most liberal theorists do not even take seriously external critics of liberalism; instead, they spend their energies defending various versions of liberalism against attack from other liberals. An entire cottage industry in philosophy, political science, and law has developed centering around the liberal theories of Rawls, Dworkin,<sup>272</sup> Ackerman, Barry, Walzer, Habermas, Sklar, and Galston. Nevertheless, in my estimation, these theories succumb to either circularity or other deficiencies in their arguments.<sup>273</sup>

(2) The problem with political conceptions that mix deliberative and dedicated concepts is their arbitrariness. No one seems to know what it means to say that deliberative and dedicated cultures should be mixed, combined or integrated, or how we determine that such an

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271. These alternatives exist within a generally progressive or liberal framework. Thus, I do not consider an alternative framework in which conservative positions reside.

272. Similar developments have occurred in jurisprudence where a severe gulf exists between mainstream theorists such as Dworkin and critical legal studies scholars, radical feminists, and critical race theorists. Raymond A. Bellotti characterizes this stalemate as follows:

[W]e experienced a sense of frustration that radical and mainstream theorists reach apparent argumentative impasses. They appear to reach a point where they simply do not share enough common ground to continue in good faith dialogue. In fact, their respective animating assumptions seem so disparate and incommensurate that each seems to end up begging the question against the other.

RAYMOND A. BELLOTTI, *JUSTIFYING LAW* 216 (1992).

273. Some circular arguments can be deep and comprehensive, dissipating the problem of circularity. Most circular arguments are unsatisfying just because they are prosaic and provincial.



integration occurs. Therefore, these theories present insuperable theoretical problems, for example, what happens when deliberative concepts conflict with dedicated ones? Can deliberative values trump dedicated values or vice versa? If so, how do we know when this occurs? Until we create a framework for conceptualizing these and other problems with mixed theories, it is difficult to take this possibility seriously. (3) In this framework, skepticism regarding political argument and justification appears both irresistible and impossible. Skepticism appears irresistible because it seems almost any theory will suffer major impediments when viewed from opposing perspectives. It appears impossible because while reflective people can resist theory and methodology, they cannot seriously give up political argument and justification. Skepticism means an end to dialogue and conversation and since humans are dialogically normative creatures, skepticism *per se* is not a viable alternative.

(4) One option that is consistent with certain versions of the preceding three is pragmatism. Let's call this option "reflective pragmatism."<sup>274</sup> It will be instructive to discuss how reflective pragmatism might arise in the context of a clash between deliberative and dedicated cultures.

So far our discussion of deliberative and dedicated cultures created an impasse. Once deliberative reasoning runs out in conflicts with dedicated cultures, the deliberativist has nothing further to say. Depending upon the kind of dedicated culture involved, a proponent of a dedicated culture will run out of things to say even earlier than the deliberativist. This impasse arises in conflicts over how to resolve concrete problems such as minority language rights, religious issues and other conflicts between cultures.

The possible rapprochement between deliberative and dedicated cultures arises once we switch the focus from particular substantive conflicts themselves to the question of how a deliberative culture should respond systemically when locked in conflict with a dedicated culture.<sup>275</sup> Recognizing that many people are committed to dedicated cultures, a deliberativist might attempt to determine which dedicated

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274. Some theorists reading pragmatism too crudely might think that "reflective pragmatism" is an oxymoron. It is not; it represents an attempt to formulate a pragmatist political theory that is at once more conservative *and* more radical than most contemporary versions. It is more conservative than pragmatic instrumentalism which looks at the short-term effects of pragmatism; it is more radical than pragmatic instrumentalism because it does not give peremptory status to contemporary suffering.

275. The following caveat must immediately be mentioned. Everything will depend upon what kinds of substantive values are part of the deliberative culture and what kinds of dedicated values are part of the dedicated culture.

values conceivably may be explained and justified on deliberativist grounds. Imagination here plays a vital factor. Deliberativism must not become encrusted and stagnant. Instead, it must seek innovative ways of making deliberative sense out of dedicated values. Here an *expansive* conception of deliberativism will do the trick, where possible, by redescribing dedicated cultures in deliberativist terms. Second, a deliberativist culture must evaluate whether some of the remaining dedicated values cause only *de minimus* harm to deliberativist values. The deliberativist must then consider the possibilities of dealing with some of the remaining values as part of an on-going conversation or dialogue with the possible result of either the dedicated culture abandoning the value, or the deliberative culture gleaning a deliberative basis for the value. Deliberative cultures must also be open to the possibility of embracing certain dedicated values. Finally, those dedicated values that the deliberativist finds pernicious must be evaluated on a case by case basis with the possibility of sometimes warranting the use force.<sup>276</sup> Correspondingly, dedicated cultures must seek to provide more of a deliberative basis for its claims, and to see the value of reasoning, revision and fallibilism.

The point here is that there might be an expanded basis or range for both deliberativism and dedicated values when the question is put in the following manner: How should a deliberative (dedicated) culture react to systematic conflict between deliberative and dedicated cultures? Do these cultural paradigms have expanded resources when confronted with a systematic clash of cultures? These questions differ from the question of how to harmonize particular deliberative and dedicated values, and *may* provide an expanded basis for communication and interaction between the two different types of cultures. The possibility of a rapprochement between deliberative and dedicated cultures might be improved by a form of pragmatism that does not embrace reason and rationality to the exclusion of the virtues of imagination, flexibility, and conciliation. Such a reflective pragmatism might combine reasoning, imagination, and the will in an eclectic attempt to provide a novel form of inquiry suited to contemporary multicultural conflicts.

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276. Force must remain a possibility because this process of attempting a rapprochement between deliberative and dedicated cultures has a limiting case, the case when fundamental principles as well as people's hearts are hardened. In this case the deliberativist and the inveterate outlaw will have no way to converse with one another.

## 2. *Reflective Pragmatism and Multicultural Constitutionalism*

Reflective pragmatism in political theory rejects the prevailing philosophy of mind that divides the faculties into reason, will, and sentiment. Intuitions of this sort are part of the background conditions of the deliberative/dedicated debate. Endorsing reflective pragmatism in political theory might require renouncing this tripartite conception of the mind. It might also require renouncing another very common intuition, that there exists a common human nature—that people are free and equal members of the human community, for instance—upon which political argument rests. Richard Rorty, for example, contends that “[t]here is a growing willingness to neglect the question ‘What is our nature?’ ” and to substitute the question ‘What can we make of ourselves.’”<sup>277</sup> Rorty sees “our task as a matter of making our culture—the human rights culture—more self-conscious and more powerful rather than demonstrating its superiority to other cultures by an appeal to something transcultural.”<sup>278</sup> In Rorty’s view, “the emergence of the human rights culture seems to owe nothing to increased moral knowledge, and everything to hearing sad and sentimental stories.”<sup>279</sup> For Rorty, our task is not to know something deep and foundational about the importance of human rights; such knowledge, if it exists, has little, or no causal efficacy, and therefore does not contribute significantly to the spread of human rights.<sup>280</sup> Our public culture assumes the importance of human rights, and except for the usual religious bromides, does not attempt to justify it in public terms. Economics,—“the extraordinary increase in wealth, literacy and leisure . . . ,” not metaphysics, “made possible an unprecedented acceleration in the rate of moral progress.”<sup>281</sup> The pragmatic approach, according to Rorty, is satisfied with the knowledge “that we live in an age in which human beings can make things much better for ourselves. We do not need to dig behind this historical fact to nonhistorical facts about what we really are.”<sup>282</sup> Indeed, it is case specific sentimental stories that do the trick if anything does. But what happens when such stories do not do the trick? Well then we must try again with new stories or with a different combination of the old stories. The fact that agreement is difficult or even impossible does not invalidate the

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277. Richard Rorty, *Human Rights, Rationality, and Sentimentality*, in *ON HUMAN RIGHTS*, *supra* note 12, at 111, 115.

278. *Id.* at 117.

279. *Id.* at 118-19.

280. *Id.* at 119.

281. *Id.* at 121.

282. *Id.*

beliefs of either opponent.<sup>283</sup> In cases of incommensurability or partial incommensurability dissensus cannot prove that either or both views are wrong because their views may not be articulatable in a shared framework or vocabulary.<sup>284</sup> What we must understand is that at some point we must simply reject our opponents entreaties and carry on with our reflective judgments.<sup>285</sup>

According to Rorty we should shift gears from Platonic and Kantian discussions about truth or reason as grounds of human rights, to sentimental stories about how we can make the moral community more inclusive, how we can get the generally decent person to care more about strangers, and how to get the less than decent person to become more decent by hearing stories about the plight of her victims. This approach might appear unrealistic; it prompts the rhetorical reply, "How is it possible for sentiment to alter the rage of the racist or the brutality of the authoritarian?" Rorty's critics are incredulous concerning his naivete in thinking something as soft as sentiment can do the job of helping us achieve utopia. Something more powerful is required, something like the iron heel of reason or reasonableness.

The problem with this reply is that it reveals a faith in reason or reasonableness that is unjustifiable.<sup>286</sup> No doubt the racist is beyond the pale of reason or reasonableness. No doubt he would not be convinced by an appeal to the victim's plight. But it is quixotic in the extreme to believe that something called reason or reasonableness can pick up the slack. Are you going to convince the skinhead that racism is wrong by asking him to read Plato or Kant? Will arguments from Hegelian or Marxian texts persuade him that Blacks and Jews are human beings? The answer should be obvious. In general, reason or reasonableness has little chance of showing the devil the importance of human rights.

The minimally decent person, however, might be a different story. Since the minimally decent person is one who cares for his family and

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283. It is just that "persons embedded within *different* discursive systems will not be able to hear the other's reasons *as* reasons, but only as errors or even delusions." Fish, *supra* note 151, at 136.

284. STEPHEN MULHALL & ADAM SWIFT, *LIBERALS & COMMUNITARIANS* 237-38 (1992). The problem of incommensurability might be exaggerated since "incommensurability does not entail noncomparability." Frederick Schauer, *Commensurability and Its Constitutional Consequences*, 45 HASTINGS L.J. 785, 787 n.8 (1994).

285. Richard Rorty, *The Priority of Democracy to Philosophy in 1 PHILOSOPHICAL PAPERS: OBJECTIVITY, RELATIVISM, AND TRUTH* 175, 187 (1991).

286. Since a reason is always derived from a context or practice, it cannot be contrasted with contexts or practices. Consequently, a reason cannot be used to adjudicate between different beliefs, nor is a reason a reason for everyone. Relying on a more muscular conception of reason is merely a liberal article of faith. Fish, *supra* note 151, at 134-35.

friends, but very few others, he does so for one of two reasons. Either his belief is based on a conception of reason or reasonableness that requires caring for your family but not strangers or he cares for his family because his sentiments prompt him to. In the latter case, sympathy, not reason is likely to extend his concerns to strangers or foreigners. In the former case, reason is unlikely to make him budge because he is not obviously unreasonable, though it may be immoral, to care exclusively for one's family.<sup>287</sup> A corollary point is that it is not obvious that reason can ground human rights without something more. Consequently in this case, an appeal to the sentiments is more likely to work than an appeal to reason.

In my estimation, Rorty's approach advances our appreciation of what advances human rights, but it is unacceptable as it stands. The most obvious problem is that in distinguishing between reason and sentiment Rorty overlooks the fact that neither exhausts the possibilities of human inquiry and reform. Instead, there possibly exists a third form of human prowess, a form that Dewey referred to as social intelligence that bridges the dichotomy between reason and feeling.<sup>288</sup>

Once we identify this error in Rorty's approach we are in a position to see that it is not some external standard, such as reason, that provides the motivation for enlarging the human moral community. Nor is it merely our sentimental appreciation of suffering. Instead, it is some combination or integration of our abilities to reason, to care, to imagine and the will to act. It is the capacity to engage in instrumental reasoning, to care for and identify with others next door as well as in remote corners of the planet, and finally it is the will and fortitude to keep focused on the importance of extending human rights despite not having an argument that somehow magically will convince racists and less than decent people to change their ways. This is a thoroughly pragmatic approach because it is eclectic. It looks at actual contexts, notes particular cases of human suffering, and selects remedy with the best chance of ameliorating it without wondering whether one is metaphysically justified in condemning this misery.<sup>289</sup> Instead, it seeks ways, sometimes including force, to reduce the amount of human misery in the world.

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287. Indeed, one form of moral monster concerns herself with strictly local concerns and excludes others from inclusion in the moral community.

288. *THE MORAL WRITINGS OF JOHN DEWEY* 122-144, 181-272 (James Gouinlock ed., 1994).

289. In an earlier work I have criticized Rorty's statement of pragmatism, arguing that he fails to distinguish between two conceptions of pragmatism. Rorty's pragmatism denigrates foundationalism without first determining whether a foundationalist language in a given case has the causal efficacy that Rortyan pragmatism requires. See Lipkin, *Pragmatism—The Unfinished Revolution*, *supra* note 40, at 1604-20.

## CONCLUSION

This Article has argued that political liberals' reliance on reasonableness undermines the force of their arguments generally, but especially in the context of a law of peoples. Liberal theory is committed to reasonableness and deliberativism which requires a willingness to cooperate in social interactions.<sup>290</sup> This contrasts with absolutist and dedicated cultures which take such a willingness to be a sign of bad faith or cowardice. No non-question begging argument exists to resolve this stalemate. Instead, we must turn to pragmatist alternatives, and to a pragmatist sense of community through the mechanisms of dialogue, conversation, and a renewed sense of what it means to truly tolerate one's enemy.

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290. In fact, there are two kinds of deliberative cultures: a deliberative culture derivable from "individual" reason and a deliberative culture derivable from "social" reason (Although, in a deeper—Wittgensteinian and Sellarsian—sense, both forms of reason are "social"). The controversy between liberalism and communitarianism can arise within the context of a deliberative culture, both eschewing dedicated cultures, yet communitarianism deriving a sense of community from the "social" dimension of reason. The distinction between deliberative and dedicated cultures is relevant to the controversy in constitutional law between liberalism and republicanism. See BRUCE ACKERMAN, *1 WE THE PEOPLE* (1991); see also CASS SUNSTEIN, *THE PARTIAL CONSTITUTION* (1994). The controversy over liberalism and republicanism is not a controversy over whether a deliberative or a dedicated culture is justifiable politically. Rather, it is a controversy over which *kind* of deliberative culture best expresses American constitutional values. The liberal chooses individual rationality, while the republican endorses social rationality. From the shoes of the liberal, individual rationality is the apotheosis of social development reducing all social conflicts to its dominion. Understood in this fashion, liberalism has a conceptual and moral aversion to dedicated cultures, since dedicated cultures stand in liberalism's way of becoming a super-culture subordinating all other cultures under its dominion.

